

Digitized by the Internet Archive
in 2010 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

2305

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 25

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

H. L. Angerer et al, etc.,

Appellees

ERROR TO
APPEAL FROM

vs.

No. 41

Circuit COURT

March Term, 1916.

Southern Traction Company et al,

etc., Appellants.

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW



Term No. 41.

In the Circuit Court of
Illinois, Fourth District.

March Term, A. D. 1919.

J. J. Angerer and
Robert Heeler, Jr. Petitioners

vs.

Southern Traction Company of
Illinois, Former & Gallagher
Company and Union Trust &
Savings Bank of East St. Louis,
Illinois, as Trustees,
Appellees

John D. Vogt, Intervenor

vs.

Southern Traction Company of
Illinois and Former & Gallagher
Company,
Appellants

Opinion by Vogt, J.

This case is prosecuted by appellants, the Southern
Traction Company and Union Trust & Savings Bank, from a decree
of the Circuit Court of St. Clair County rendered in a first
lien proceeding, which said decree finds that Robert Heeler, Jr.,
Angerer, for the use of Robert Heeler, Jr. is entitled to a
lien for \$34,303.51 and John D. Vogt, intervening petitioner
to a lien for \$1,219.06, and that he is also entitled to a
judgment lien for \$4,003.83.

~~On record disclosed that on December 2, 1918, the~~
~~petitioners, J. J. Angerer and Robert Heeler, Jr., filed a peti-~~
~~tion against the Southern Traction Co. and the Union~~

Term No. 41. In the Senate Court of
Illinois, Fourth District.
March 10, 1911.

Robert Appleby, Jr. . . . Angerer and

38

Illinois, as stated, having a lack of statistics, from any and all sources, Illinois, only a limited number of Southern Workingmen's Party of

John B. Wolf

224

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Philippines.

• 6 •

~~This record is preserved by the Southern
Protection Company and states that a mining lease, from a decree
of the District Court of St. Louis County, rendered in a railroad
right-of-way case, which said decree that the railroad be
granted, for the use of Robert Hebert, Jr. is entitled to a
lien for \$4,500.00 and John D. Post, including registration
to a lien for \$1,500.00, and that he is also entitled to a
lien for \$4,500.00.~~

1. The following information was obtained from the records of the Federal Bureau of Investigation, New York City, New York, dated 10/10/50, and 10/11/50, and 10/12/50, and 10/13/50, and 10/14/50, and 10/15/50, and 10/16/50, and 10/17/50, and 10/18/50, and 10/19/50, and 10/20/50, and 10/21/50, and 10/22/50, and 10/23/50, and 10/24/50, and 10/25/50, and 10/26/50, and 10/27/50, and 10/28/50, and 10/29/50, and 10/30/50, and 10/31/50, and 11/1/50, and 11/2/50, and 11/3/50, and 11/4/50, and 11/5/50, and 11/6/50, and 11/7/50, and 11/8/50, and 11/9/50, and 11/10/50, and 11/11/50, and 11/12/50, and 11/13/50, and 11/14/50, and 11/15/50, and 11/16/50, and 11/17/50, and 11/18/50, and 11/19/50, and 11/20/50, and 11/21/50, and 11/22/50, and 11/23/50, and 11/24/50, and 11/25/50, and 11/26/50, and 11/27/50, and 11/28/50, and 11/29/50, and 11/30/50, and 12/1/50, and 12/2/50, and 12/3/50, and 12/4/50, and 12/5/50, and 12/6/50, and 12/7/50, and 12/8/50, and 12/9/50, and 12/10/50, and 12/11/50, and 12/12/50, and 12/13/50, and 12/14/50, and 12/15/50, and 12/16/50, and 12/17/50, and 12/18/50, and 12/19/50, and 12/20/50, and 12/21/50, and 12/22/50, and 12/23/50, and 12/24/50, and 12/25/50, and 12/26/50, and 12/27/50, and 12/28/50, and 12/29/50, and 12/30/50, and 12/31/50, and 1/1/51, and 1/2/51, and 1/3/51, and 1/4/51, and 1/5/51, and 1/6/51, and 1/7/51, and 1/8/51, and 1/9/51, and 1/10/51, and 1/11/51, and 1/12/51, and 1/13/51, and 1/14/51, and 1/15/51, and 1/16/51, and 1/17/51, and 1/18/51, and 1/19/51, and 1/20/51, and 1/21/51, and 1/22/51, and 1/23/51, and 1/24/51, and 1/25/51, and 1/26/51, and 1/27/51, and 1/28/51, and 1/29/51, and 1/30/51, and 1/31/51, and 2/1/51, and 2/2/51, and 2/3/51, and 2/4/51, and 2/5/51, and 2/6/51, and 2/7/51, and 2/8/51, and 2/9/51, and 2/10/51, and 2/11/51, and 2/12/51, and 2/13/51, and 2/14/51, and 2/15/51, and 2/16/51, and 2/17/51, and 2/18/51, and 2/19/51, and 2/20/51, and 2/21/51, and 2/22/51, and 2/23/51, and 2/24/51, and 2/25/51, and 2/26/51, and 2/27/51, and 2/28/51, and 2/29/51, and 2/30/51, and 3/1/51, and 3/2/51, and 3/3/51, and 3/4/51, and 3/5/51, and 3/6/51, and 3/7/51, and 3/8/51, and 3/9/51, and 3/10/51, and 3/11/51, and 3/12/51, and 3/13/51, and 3/14/51, and 3/15/51, and 3/16/51, and 3/17/51, and 3/18/51, and 3/19/51, and 3/20/51, and 3/21/51, and 3/22/51, and 3/23/51, and 3/24/51, and 3/25/51, and 3/26/51, and 3/27/51, and 3/28/51, and 3/29/51, and 3/30/51, and 3/31/51, and 4/1/51, and 4/2/51, and 4/3/51, and 4/4/51, and 4/5/51, and 4/6/51, and 4/7/51, and 4/8/51, and 4/9/51, and 4/10/51, and 4/11/51, and 4/12/51, and 4/13/51, and 4/14/51, and 4/15/51, and 4/16/51, and 4/17/51, and 4/18/51, and 4/19/51, and 4/20/51, and 4/21/51, and 4/22/51, and 4/23/51, and 4/24/51, and 4/25/51, and 4/26/51, and 4/27/51, and 4/28/51, and 4/29/51, and 4/30/51, and 5/1/51, and 5/2/51, and 5/3/51, and 5/4/51, and 5/5/51, and 5/6/51, and 5/7/51, and 5/8/51, and 5/9/51, and 5/10/51, and 5/11/51, and 5/12/51, and 5/13/51, and 5/14/51, and 5/15/51, and 5/16/51, and 5/17/51, and 5/18/51, and 5/19/51, and 5/20/51, and 5/21/51, and 5/22/51, and 5/23/51, and 5/24/51, and 5/25/51, and 5/26/51, and 5/27/51, and 5/28/51, and 5/29/51, and 5/30/51, and 5/31/51, and 6/1/51, and 6/2/51, and 6/3/51, and 6/4/51, and 6/5/51, and 6/6/51, and 6/7/51, and 6/8/51, and 6/9/51, and 6/10/51, and 6/11/51, and 6/12/51, and 6/13/51, and 6/14/51, and 6/15/51, and 6/16/51, and 6/17/51, and 6/18/51, and 6/19/51, and 6/20/51, and 6/21/51, and 6/22/51, and 6/23/51, and 6/24/51, and 6/25/51, and 6/26/51, and 6/27/51, and 6/28/51, and 6/29/51, and 6/30/51, and 7/1/51, and 7/2/51, and 7/3/51, and 7/4/51, and 7/5/51, and 7/6/51, and 7/7/51, and 7/8/51, and 7/9/51, and 7/10/51, and 7/11/51, and 7/12/51, and 7/13/51, and 7/14/51, and 7/15/51, and 7/16/51, and 7/17/51, and 7/18/51, and 7/19/51, and 7/20/51, and 7/21/51, and 7/22/51, and 7/23/51, and 7/24/51, and 7/25/51, and 7/26/51, and 7/27/51, and 7/28/51, and 7/29/51, and 7/30/51, and 7/31/51, and 8/1/51, and 8/2/51, and 8/3/51, and 8/4/51, and 8/5/51, and 8/6/51, and 8/7/51, and 8/8/51, and 8/9/51, and 8/10/51, and 8/11/51, and 8/12/51, and 8/13/51, and 8/14/51, and 8/15/51, and 8/16/51, and 8/17/51, and 8/18/51, and 8/19/51, and 8/20/51, and 8/21/51, and 8/22/51, and 8/23/51, and 8/24/51, and 8/25/51, and 8/26/51, and 8/27/51, and 8/28/51, and 8/29/51, and 8/30/51, and 8/31/51, and 9/1/51, and 9/2/51, and 9/3/51, and 9/4/51, and 9/5/51, and 9/6/51, and 9/7/51, and 9/8/51, and 9/9/51, and 9/10/51, and 9/11/51, and 9/12/51, and 9/13/51, and 9/14/51, and 9/15/51, and 9/16/51, and 9/17/51, and 9/18/51, and 9/19/51, and 9/20/51, and 9/21/51, and 9/22/51, and 9/23/51, and 9/24/51, and 9/25/51, and 9/26/51, and 9/27/51, and 9/28/51, and 9/29/51, and 9/30/51, and 10/1/51, and 10/2/51, and 10/3/51, and 10/4/51, and 10/5/51, and 10/6/51, and 10/7/51, and 10/8/51, and 10/9/51, and 10/10/51, and 10/11/51, and 10/12/51, and 10/13/51, and 10/14/51, and 10/15/51, and 10/16/51, and 10/17/51, and 10/18/51, and 10/19/51, and 10/20/51, and 10/21/51, and 10/22/51, and 10/23/51, and 10/24/51, and 10/25/51, and 10/26/51, and 10/27/51, and 10/28/51, and 10/29/51, and 10/30/51, and 10/31/51, and 11/1/51, and 11/2/51, and 11/3/51, and 11/4/51, and 11/5/51, and 11/6/51, and 11/7/51, and 11/8/51, and 11/9/51, and 11/10/51, and 11/11/51, and 11/12/51, and 11/13/51, and 11/14/51, and 11/15/51, and 11/16/51, and 11/17

Gallagher Co. to establish a lien against said Traction Company for ties, alleged to have been furnished said Lorimer & Gallagher Company as general contractors for the construction of a line of railroad from West St. Louis to Belleville for the Southern Traction Company and alleging that the net amount due for said materials is \$25,438.84.

Joint answers were filed by the Southern Traction Company and the Lorimer & Gallagher Company to said petition on Feb. 9, 1914. On March 3, 1914, appellee, John D. Vogt filed an intervening petition alleging that he had been employed by the Southern Traction Co. to do certain grading on said railroad right-of-way; that said Traction Co. had failed to pay him therefor; and that on the 17th day of August 1913, he recovered a judgment against said Traction Co. for \$4,253.33; that execution had been issued and returned unsatisfied, and that said judgment was a lien on the property of said Southern Traction Co. It is further alleged by said intervening petition filed by said John D. Vogt that he had performed other work in connection with the construction of said right-of-way and that when said construction was abandoned there was due him for said work a balance of \$11,000. On the 19th day of August 1914 ~~plaintiff~~ ^{plaintiff} filed an amended petition setting forth practically the same facts as in its original petition, excepting that it charged that the amount owing to them was \$3,803.66. Said petition further averred that the contract for said material was entered into between the complainant, J. J. Angerer and the

The original petition was filed December 9, 1913, and on August 19, 1914

[Loriper & Callagher Co. and that thereafter ~~appellee~~, J. J. Angerer, assigned all his right and interest in said contract and in any lien he might have for materials furnished to appellee, Robert Abeles, Jr. to said amended bill or petition ^{defendant} ~~appellee~~, the Union Trust and Savings Bank of East St. Louis, was a party defendant.

^{defendant} ~~appellee~~, Union Trust & Savings Bank, filed its answer to said amended bill praying strict proof of the matters and things averred therein, and in addition there to contained this averment: "This defendant answering further says, that it has not any interest in the Southern Traction Company of Illinois, as Trustee or otherwise, except that the Union Trust and Savings Bank of East St. Louis, Illinois, holds twenty-five thousand dollars (\$25,000) of bonds as collateral security to secure an indebtedness of J. J. Trautmann, J. J. Rodenberg, J. J. Harniss, J. J. Clark and E. W. Thompson, for the sum of four thousand dollars, or thereabouts, and that said bonds were put up as collateral by said Harniss to secure said indebtedness and that this defendant denies that its right to hold said bonds are subject to any lien or claim of J. J. Angerer and Robert Abeles, Jr., and that its right to hold said bonds to secure said indebtedness is a first and prior right thereto, and \$25,000.00 in bonds are held as trustee that were never delivered."

Issues were joined and said cause was referred to the Master in Chancery of said Court who took the evidence in said cause and reported the same to the court together with his conclusions of law and fact. The finding of the

master being to the effect that appellee, ~~Robert Lewis, Jr.~~, for the use of appellee, Robert Lewis, Jr. was entitled to a lien against the Southern Traction Co. for \$33,707.37, and that intervening petitioner, John L. Vogt, was entitled to a lien for work and labor performed by him in the construction of said right of way for \$1,487.02, and that he was entitled to a lien as judgment creditor against said railroad property for \$4,359.83.

Said master also found that on Jan. 1, 1908, the Southern Traction Co. issued bonds in the aggregate amount of \$1,500,000.00, which said bonds were secured by a trust deed to the Union Trust and Savings Bank, Trustee, which said trust deed was filed for record in the recorder's office of St. Clair County on the 20th day of November, 1908. The Circuit Court on hearing confirmed the report of said master and entered a decree in accordance therewith.

The evidence disclosed among other things that the Southern Traction Company is a railroad corporation, organized under the railroad laws of Illinois. The purpose of the company was to build an electric railroad from St. Louis across the municipal bridge thence through East St. Louis to Belleville, Illinois, and to other points east and south-east of Belleville. It was organized prior to 1906. Its principal organizer was one W.D. Graham, Jr., of St. Louis, Missouri. On November 16, 1908, it executed a mortgage to appellant, Union Trust & Savings Bank, Trustee, to secure the payment of \$1,500,000.00 of its bonds, the mortgage being dated January 1, 1908, and was filed for record in the Recorder's office of St. Clair County November 20, 1908.

[illegible]

Very little work was done in the building of the line from East St. Louis to Belleville until 1913. The capital stock of the Southern Traction Company was \$1,500,000, all of which was owned by W.D. Hepham, Jr., about 26 or 27 shares. The stock was after increased to \$7,500,000.00 but there is no evidence that said additional stock was ever issued.

On July 19, 1913, the Southern Traction Company entered into a contract with the said W.D. Hepham, Jr., for the building and equipping of the railroad, and on the same day, Hepham entered into a contract with the Lorimer & Gallagher Company for the construction of that part of the railroad from East St. Louis to Belleville.

The evidence further discloses that on June 22, 1913, appellee, J. L. Angerer entered into a written contract with the Lorimer & Gallagher Company for the furnishing of ties to be used in the construction of the road between East St. Louis and Belleville. The evidence tends to show the ties were furnished and on November 20, 1913, Angerer served a notice upon the president of the Southern Traction Company claiming a lien upon all of the property of the Southern Traction Company to secure the amounts due him from the Lorimer & Gallagher Company under his contract with it for the furnishing of ties.

Thereafter on December 3, 1913, Angerer assigned his interest in said claim to appellee, Beales.

In the decree rendered by the Circuit Court it made a finding to the effect that the Lorimer and Gallagher Co. had gone into bankruptcy and that the Southern Traction Co.

Very little work was done in the building of the line from East St. Louis to Belleville until 1911. The capital stock of the Southern Traction Company was \$1,500,000. All of which was owned by R.D. Epham, Jr., except 26 or 27 shares. The stock was after increased to \$2,500,000 but there is no evidence that said additional stock was ever issued.

On July 12, 1913, the Southern Traction Company entered into a contract with the said R.D. Epham, Jr., for the building and equipping of the railroad, and on the same day, Epham entered into a contract with the Lorimer & Gallagher Company for the construction of that part of the railroad from East St. Louis to Belleville.

The evidence further discloses that on June 2, 1913, appellee, A. I. Angerer entered into a written contract with the Lorimer & Gallagher Company for the furnishing of ties to be used in the construction of the road between East St. Louis and Belleville. The evidence tends to show the ties were furnished and on November 20, 1913, Angerer served a notice upon the president of the Southern Traction Company claiming a lien upon all of the property of the Southern Traction Company to secure the amounts due him from the Lorimer & Gallagher Company under his contract with it for the furnishing of ties.

Thereafter on December 3, 1913, Angerer assigned his interest in said claim to appellee, Weber.

In the decree rendered by the Circuit Court it made a finding to the effect that the Lorimer and Gallagher Co. had gone into bankruptcy and that the Southern Traction Co.

was in the hands of a receiver and that the court would not undertake to determine the right of priority between said lien holders and the lien of the Union Trust & Savings Bank, Trustee, and found that this question would have to be determined by the United States Court before which said matter was pending.

The decretal order of the trial court, however, provided for a sale of the property of the Southern Traction Co. and out of the proceeds it was ordered that the Master in Chancery pay the costs incident to said proceedings, including his commissions, and that he next pay the judgment held by appellee, John F. Vogt, and out of the residue of said funds, if any, he pay the amount found to be due to appellees, Ingerrer for the use of Heales, and the amount found to be due Appellee, Vogt, on his intervening petition, but made no provision for payment of any amount to the Union Trust & Savings Bank.

Various grounds are urged by appellant Southern Traction Co. for a reversal of said decree. The first ground urged is that appellees are sub-contractors of a sub-contractor and that therefore under the railroad lien statute would not be entitled to a lien. This raises the question as to whether the Lorimer & Gallagher Co. was the general contractor for the building of said road between East St. Louis and Belleville or whether it was a sub-contractor under L. D. Hephan.

The record discloses that L. D. Hephan owned all of the stock of said road consisting of \$1,500,000.00 with the exception of some twenty-five or thirty shares, and that

he sold all of the bonds issued by said Southern Traction Co. amounting to \$1,500,000. with the exception of \$25,000. The evidence further discloses that Lehigh was acting as the general agent of said company and that while he entered into a contract with the Southern Traction Co. in which he agreed to construct the proposed road, at the same time he immediately entered into a contract with the Lorimer & Gallagher Co. to build that part of said road extending from East St. Louis to Belleville, in which said contract so entered into with the Lorimer & Gallagher Co. it was provided that said construction company was to furnish all of the materials and do all of the work necessary to complete said railroad.

It was further provided in the contract between the Southern Traction Co. and W.B. Lehigh, that said Traction Co. would guarantee and stand good for any contract entered into by him for the building of said road. The evidence further discloses that contemporaneous with the contract entered into between Lehigh and the Lorimer & Gallagher Co. the Southern Traction Co. entered into a contract with the Lorimer & Gallagher Co. guaranteeing the faithful performance of the contract entered into by Lehigh with the said Lorimer & Gallagher Co. The language of said contract being: "That the Southern Traction Co. of Illinois, hereby assents to and ratifies all the terms, provisions and conditions in said contract so far as practicable and it may legally do so, and makes itself directly and immediately liable to said Lorimer & Gallagher Co. for the faithful performance by W.B. Lehigh, Jr. of all obliga-

[illegible][illegible]

tions by him to be performed, and the payment to be by him made, and it does hereby agree for all intents and purposes to accept the said contractor as and to hold him or so far as it may lawfully do so and does further agree that the said Lorimer & Gallagher Co. for all intents and purposes bear the relation and enjoy the rights of a contractor under and by virtue of the lien laws of the State of Illinois. We, therefore, hold that for the purpose of this proceeding the Lorimer & Gallagher Co. were contractors and that appellees, Angerer for the Use of Abels, and John E. Vogt intervening petitioner were sub-contractors and as such were entitled to maintain their lien. *Johnson v. Nichols*, 113 Ill. 181; *Harrell v. Butler*, 174 Ill. 27.

It is next urged by the Southern Traction Co. that the evidence fails to show what number, if any, of the ties furnished by appellee Angerer went into the construction of said road. The evidence in the record tended to show that the ties for which a lien is claimed were furnished by appellee Angerer and that these same ties went into the construction of the road. Whether the evidence on this issue was sufficient was a matter to be determined by the Master from the evidence. The master's finding with reference to this question is as follows: "The Master in Chancery therefore finds that the said complainant, . . . Angerer for the use of Robert Abels, Jr. has furnished ties as alleged in the bill which were used in the building of the road of said Southern Traction Company. This finding of fact was not objected to before the Master or excepted to on the hearing

The following is a summary of the evidence presented at the trial of the defendant, John Doe, charged with the murder of Jane Smith.

The prosecution called several witnesses, including the victim's brother, who testified that he saw his sister being taken away from her home on the night of the murder. He also testified that he saw a man, whom he identified as the defendant, standing near the car in which she was taken away.

The defense called two witnesses, both of whom testified that they were with the defendant at the time of the murder. They claimed that the defendant was with them all night long and did not go anywhere near the victim's home.

The jury heard the testimony of all the witnesses and returned a verdict of guilty against the defendant. The judge sentenced him to life imprisonment.

before the Circuit Court and cannot in this court be raised for the first time.

It is next contended by appellant, the Southern Traction Co. that before appellees would be entitled to a lien they must establish by the evidence that something was due to the Lorimer & Gallagher Co. the general contractors. It is not necessary for us to pass on the correctness of this contention as appellees were basing their claim for a lien on the provisions of Section 7 of the Railroad Lien Statute, being Section 13 of Chapter 32 of Paul's Revised Statutes. Under the provisions of this statute the subcontractor has the right to a lien upon giving the proper notice and taking the necessary steps, notwithstanding the original contractor has not completed his contract; in fact, the lien attaches where the contractor has abandoned the work. The Master finds that while the Lorimer & Gallagher Company had not completed its contract it had furnished material and performed work, etc. on the construction of the line of railroad to be constructed by them to the extent of \$750,000, said finding being as follows: "The Lorimer & Gallagher Co. has never received a cent. ... he was the organizer and principal promoter of the road. He was the driving spirit. After the contract between Lorimer and the Southern Traction Co. was entered into, Lorimer did no more contract work. It was done by the Lorimer & Gallagher Co. and their sub-contractors. The \$750,000 put in by the Lorimer & Gallagher Co. is my estimate and includes what they advanced for ties and grading..... before the date of the Lorimer & Gallagher Company's contract, July 15, 1911, no moneys were turned over to the Lorimer & Gallagher Co."

That being true, we see no reason why appellees could not be entitled to their lien. This finding by the Master that

before the Circuit Court and cannot in this court be raised for the first time.

It is next contended by appellant, the Southern Traction Co., that before a lien would be entitled to a lien they must establish by the evidence that something was due to the Lorimer & Gallagher Co. the general contractors. It is not necessary for us to pass on the correctness of this contention as appellees were basing their claim for a lien on the provisions of Section 7 of the railroad lien statute, being Section 13 of Chapter 2 of Lord's Revised Statutes. Under the provisions of this statute the sub-contractor has the right to a lien upon giving the proper notice and taking the necessary steps, notwithstanding the original contractor has not completed his contract: in fact, the lien attaches where the contractor has abandoned the same. The master finds that while the Lorimer & Gallagher Company had not completed its contract it had furnished material and performed work, etc. on the construction of the line of railroad to be constructed by them to the extent of \$713,000, said finding being as follows: "The Lorimer & Gallagher Co. has never received a cent. . . . He has been the organizer and principal promoter of the road. He was the moving spirit. After the contract between Lenham and the Lorimer & Gallagher Co. was entered into, Lenham did no more contract work. It was done by the Lorimer & Gallagher Co. and their sub-contractors. The \$725,000 put in by the Lorimer & Gallagher Co. is by estimate and includes what they advanced for ties and grading. . . . before the date of the Lorimer & Gallagher Company's contract, July 15, 1912, no bonds were turned over to the Lorimer & Gallagher Co."

That being true, we see no reason why appellees could not be entitled to their lien. This finding by the master that

The Lorimer & Gallagher Co. had expended the said amount, being supported by the evidence, was a finding of fact, and not being excepted to by appellants cannot be raised in this Court for the first time.

It is next insisted by appellants that inasmuch as appellee E.J. Angerer, had furnished the materials for which the lien in question is sought to be enforced, that he could not assign said lien to Robert Beles, Sr. so as to permit him to enforce the lien. In support of this contention appellants cite the case of *Osairo and Vincennes Lumber Co. v. Mackney*, 78 Ill. 110. We have examined this case and find that it does not apply to the facts in this case. The case cited was an action in assumpsit and it is well understood that a claim cannot be assigned in law so as to enable the assignee to maintain a suit thereon in his own name. The lien here is sought to be enforced in a court of equity and is carried on in the name of the original lien holder for the use of a third party. The weight of authority in our judgment warrants such proceeding. *American & English Encyclopedia*, Vol. 15, page 140-143, 1st ed.; *Major v. Collins* 22 Ill. App. 633; *Phoenix, etc. Ins. Co. v. Patchen* 6 Ill. 621.

It is also insisted by appellant, Southern Traction Co. that the Lorimer & Gallagher Co. has waived all rights to a lien by accepting the bonds of the Southern Traction Co. as security for the payment of the contract price, and that appellees, being sub-contractors under the Lorimer & Gallagher Co. are bound by that waiver. We record and do not bar out appellant's contention that the Lorimer & Gallagher Co. had received bonds of the Traction Co. in payment for

not being admitted to by individuals known to be in this
being admitted to the witness, was a further act of
the following is a summary of the evidence of the witness.

The above information was obtained from a review of the files of the FBI, New York Office, dated 10-17-68.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

On 11/11/1964, the following information was received from the Bureau of the Census, Washington, D.C.:

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a very important document, as it sets out the President's policy for the new year. The President states that he is pleased to see the Congress assembled, and that he is confident that the country is in a good position to meet the challenges of the future. He also mentions the recent election of Abraham Lincoln as President, and expresses his confidence in Lincoln's ability to lead the country.

[illegible]

1. The following are the names of the persons who have been identified as having been in contact with the subject during the period of the investigation:

the work to be done by it. The finding of the master as heretofore referred to is the effect that no payment had ever had been made to the former & Kellogg Co., and we think that this finding of the master is supported by the evidence and the finding no value attached to in the trial court is binding on appellants here.

It is further urged by appellant, the Southern Traction Co. that the decree in favor of appellee, Angerer for the use of Abeles is for too large an amount. In support of this contention, attention is called to the fact that in the original petition filed by appellants Angerer for the use of Abeles, a lien was claimed for 47,364.21 cross ties and 3536 16.2 cross ties. The contract price therefore being \$32,450.30, from which should be deducted freight charges of \$1,373.92, leaving a balance owing for said ties of \$36,465.88, while in the amended petition filed on August 2, 1914 by appellants Angerer and Abeles in addition to ties mentioned in their original petition they make claim to a lien for 17,760 .21 ties, thereby bring the amount of their total claim for material to \$54,715.38, and the net amount after deducting freight to \$53,903.66.

We are inclined to hold that inasmuch as the amended bill claiming for these extra materials was not filed for more than three months after the lien had accrued, appellees, would not be entitled to a lien for said extras, for the reason that as to them, said amended petition set forth a new cause of action. Carey-Townsend v. O'Leary, 125 Mo. 234. We are also of the opinion that unless interest

[illegible]

is claimed in the bill the Court would not be warranted to decree interest to the lien claimant.

In addition to the foregoing grounds urged by the Southern Traction Co. for a reversal of the decree in this case, appellant, the Union Trust & Savings Bank further insists that the trial court erred in failing to find that it, the Union Trust & Savings Bank was entitled, as such trustee, to a prior lien under its trust deed on the property of the Southern Traction Co. as against appellees. On the other hand appellees take the position that inasmuch as the United States District Court has appointed a receiver for the Southern Traction Co. and the Lorimer & Gallagher Co. are in bankruptcy that all that appellees can procure in this proceeding is the establishment of their liens and that they are not in a position to enforce a sale of the property of the Traction Company to pay the same, and further that the trial court is not in a position to make a finding as to priorities between the Union Trust & Savings Bank, Trustee, and themselves as lien holders. Apparently that is all that the trial court intended to do, and the decretal order directing a sale of the premises and the payment of the judgment held by appellee, Vogt, and the liens found in favor of appellees, Engerer for Abeles, and of the intervening petitioner, Vogt, was not in keeping with the finding of the Court.

Aside from the bankruptcy and receivership proceedings in the United States Court we do not believe appellant, Union Trust & Savings Bank are in a position to insist on a decree giving it a prior lien on the property involved.

is stated in the bill the Court would not be authorized
to decide later as to the issue involved.

In addition to the foregoing grounds stated by the
Southern Railway Co. for a reversal of the decree in this
case, counsel for the Union Trust Company have stated that
the trial court erred in holding to the fact that
the Union Trust Company's claim was satisfied, as when from
the fact that the Union Trust Company was the owner of the property
of the Southern Railway Co. as against the Union Trust Company.
Other facts appearing from the position that the Union Trust Company
United States District Court has appointed a receiver for the
Southern Railway Co. and the Union Trust Company, and in
bankruptcy proceedings and that the Union Trust Company can procure in this
country is the establishment of their claim and that they
are not in a position to enforce a sale of the property
of the Southern Railway Co. by the same, and further that
the trial court is not in a position to make a finding as to
the position between the Union Trust Company and the Southern
Railway Co. and the Union Trust Company. Apparently that is all that
the trial court intended to do, and the decretal order di-
recting a sale of the property and the payment of the debt
must hold by implication, that, and the issue found in favor of
appellee, except for appeal, and of the intervening re-
spondent, and was not in keeping with the finding of the
Court.

Under the authority and precedents presented
in the United States Court we do not believe that
the Union Trust Company is in a position to make a sale of the
property and the payment of the debt.

To begin with, the answer filed by the Union Trust & Savings Bank to the amended petition of Appellant, Angerer and Steley does not disclose definitely the interests the Union Trust & Savings Bank purport to represent. The conclusion naturally to be drawn from the answer filed by said bank would be that the only thing it was interested in was to have a lien established in its favor as to the \$25,000.00 in bonds held by it as collateral security for a note given by Leapham and others, and that so far as the holders of the other bonds for which the trust deed was made to it was executed, it did not concern itself. The record in this case does not even disclose that the bonds of \$25,000.00 which said bank claims to hold as collateral security for a \$40,000.00 note given by Leapham and others were even produced in evidence, and they are not shown in this record.

Edward E. Hosmer, one of the officers of the Union Trust & Savings Bank testified that Appellant, Union Trust & Savings Bank was a defendant in another suit pending in the Federal Court with reference to the same bonds (that is the bonds secured by the trust deed held by said bank) and that it had set up its rights by an answer filed in that suit. He also testified "I don't know who are now the owners and holders of the \$1,475,000.00 worth of bonds that were turned over to J.D. Leapham, Jr." It was stated at the hearing by Judge Cook, who represented the Union Trust & Savings Bank "that we are giving this evidence at the request of the parties who brought us in here, but we are also defendant in a suit in the Federal Court and have

[illegible]

filed an answer there." The witness Reiner further testified "I might say we have been enjoined since it is receivership from turning them over (that is the bonds) to anybody but we are ready and willing to turn them over under an order or decree of the proper court directing us to do so."

We are, therefore, of the opinion that the trial court did not err in failing to decree the lien of the Union Trust & Savings Bank a prior lien to that held by appellees.

It is further strenuously insisted by the Union Trust & Savings Bank that inasmuch as it was not made a party to the original petition filed by appellees, Angerer and Abeles, that, therefore, appellees are not in a position to litigate with appellant, Union Trust & Savings Bank the question of priorities and that the right to a prior lien by appellant, Union Trust & Savings Bank, would therefore follow as a matter of law. In view of what we have already said it is hardly necessary for us to pass on this question. However, as it has been raised and so strenuously urged it will probably not be amiss for us to consider the same in this opinion. To begin with, the lien claimed by appellees is under the provisions of the railroad lien act which provides upon proper notice being given for a lien in favor of a sub-contractor where the original contractor has failed to complete his contract and has abandoned the same. Section 5 of said Act further provides: "that the lien hereby created shall continue for three months from the time of the performance of the sub-contract or doing of the

The first of these is the fact that the
 Government has not yet decided whether
 it will accept the offer of the
 United States to purchase the
 Alaska Pipeline. The second is the
 fact that the Government has not yet
 decided whether it will accept the
 offer of the United States to purchase
 the Alaska Pipeline. The third is the
 fact that the Government has not yet
 decided whether it will accept the
 offer of the United States to purchase
 the Alaska Pipeline.

work or furnishing the material as aforesaid, except when suit shall be commenced by petition as aforesaid, and in such cases all liens shall be barred by decree entered in such cases." Appellant, Union Trust & Savings Bank, neither by plea in abatement, demurrer or plea of the statute of limitations raised the question in the trial court of the right of appellees to maintain their said petition by reason of not having made it a party thereto within the three months specified in said statute. Not having done so, it has waived its right so to do and cannot now for the first time present this question in this court. *Barstow v. Melachian*, 171 Ill. 641.

It is further contended by appellant, Union Trust & Savings Bank that it should have been made a party defendant to the intervening petition of John D. Vogt. We do not think this point well taken as the intervening petition filed by appellee amounts in effect to an answer to the original petition filed by appellees, Angerer and Abeler, and does not amount to a cross bill.

On the hearing before the Master and throughout the trial counsel for appellees conceded that all they were entitled to in this proceeding was to establish their right to a lien; that the trial court had no power to determine the matter of preference as between the liens of appellees and the lien of the Union Trust & Savings Bank under its trust deed and that they were not entitled to a sale of the property of the Southern Traction Co. to satisfy said liens for the reason that proceedings were pending in the United States District Court wherein said matters should be determined and adjudicated.

The Southern Lumber Co. practically conceded as much. The Union Trust & Savings Bank is the only party to this proceeding that is seriously insisting that the question of priorities among the lien holders should be determined in this proceeding. Our holding in reference to the determination made by said Union Trust & Savings Bank for a determination of priority between the lien held by it under said trust deed and the lien of appellees, is that said Union Trust and Savings Bank has left the record in such an unsatisfactory and indefinite condition with reference to the claim for lien made by it that without reference to the proceeding pending in the United States District Court, neither the Circuit Court, nor this Court could advisedly determine the same, and we shall not undertake to do so on this record.

Other errors were assigned, but what we have already said practically covers all questions raised by such assignments so far as necessary. The decree of the Circuit Court will therefore be reversed and the cause remanded with direction to disallow those items claimed by appellees, Angerer and Abeles, in the amended petition that were not included in the original petition, and that the matter of priorities between the Union Trust & Savings Bank and appellees as lien holders herein be not determined in this proceeding so long as the United States District Court has jurisdiction thereof.

Reversed and remanded with directions.

Not to be reported in full.

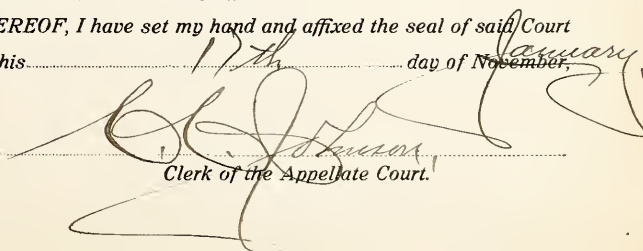
The following is a summary of the proceedings of the
The first of the two days of the trial was
this proceeding is a summary of the proceedings of the
of the trial. The first of the two days of the trial was
this proceeding. The first of the two days of the trial was
tion was by the first of the two days of the trial was
nation of the first of the two days of the trial was
trust had and the first of the two days of the trial was
Trust and the first of the two days of the trial was
evidence and the first of the two days of the trial was
the first of the two days of the trial was
proceeding in the first of the two days of the trial was
either the first of the two days of the trial was
appearing the first of the two days of the trial was
this record.

The first of the two days of the trial was
this proceeding. The first of the two days of the trial was
tion was by the first of the two days of the trial was
nation of the first of the two days of the trial was
trust had and the first of the two days of the trial was
Trust and the first of the two days of the trial was
evidence and the first of the two days of the trial was
the first of the two days of the trial was
proceeding in the first of the two days of the trial was
either the first of the two days of the trial was
appearing the first of the two days of the trial was
this record.

and the first of the two days of the trial was

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 13th day of January,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....

2366

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 28

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Joseph Bisencon,

Appellant

vs.

No. 42

March Term, 1916.

Wesley Walters,

Appellee

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW

THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

OF THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

LONDON

PRINTED BY J. STURGEON

IN THE YEAR 1704

BY

JOHN BURNET

OF THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

LONDON

PRINTED BY J. STURGEON

IN THE YEAR 1704

BY

JOHN BURNET

OF THE UNIVERSITY OF OXFORD

Term No. 42

In the Appellate Court

Appellate No. 10

of Illinois, Fourth District.

March Term, 1916.

Joseph Wisencon, Appellant

vs.

Verley Walters, Appellee.

} Appeal from the Circuit Court
of St. Clair County.

Opinion by ROGERS, J.

An action of forcible entry and detainer was brought by appellant against appellee in the Circuit Court of St. Clair County, at the April Term, 1915. A trial by the court without a jury resulted in a judgment in favor of appellee and against appellant in bar of action and for costs, from said judgment appellant prosecutes this appeal.

[The land in controversy consists of some 2.46 acres, sometimes described as lots 15, 17 and 23 in the village of Cahokia, Illinois. ^{Plaintiff} ^{defendant} Appellant and appellee ~~are~~ ^{were} both tenants, ^{plaintiff} Appellant being a tenant of August A. Busch, who claimed to own a tract of about 190 acres, which tract included the 2.46 acres above mentioned, ^{and defendant} ~~appellee~~ ^{being a} tenant of the widow of Joseph Lavelle, who claimed some interest in said above described premises.]

No propositions of law were submitted to be held or refused by the trial court on the hearing of said cause, and as no question is raised on the pleadings, the only mat-

ters to be determined by this court under the assignment of errors is, first, whether the court erred in its ruling on the evidence, and, second, whether the finding of the court is against the manifest weight of the evidence. *Oran v. Hourigan*, 188 Ill. 361; *Hobbs v. Ferguson* 190 Ill. 337.

Numerous objections were taken to the ruling of the court on the evidence tendered on the trial, but practically all of these objections were waived by not being argued in appellant's brief. Appellant insists that the court erred in refusing to allow the witness, Fitzman, to testify in reference to a survey he made of certain premises claimed to be owned by August W. Busch, and which said premises include the tract of land in controversy. We have examined the record in connection with this objection and find that the witness Fitzman was acting as the agent of Busch, and whatever survey he purported to make he made it at the instance of Busch, without appellee or his land lord being present, or without their having been notified to attend so we are of the opinion that the court did not err in refusing to hear this testimony. At any rate, no error resulted from this ruling as said witness was allowed to testify that he caused the 190 acre tract above referred to, which included as a part of the same the premises in controversy, to be fenced, and that as the agent of said Busch, he rented said 190 acre tract of land to the appellant.

In an action of this character, the possession or the right of possession of the premises is the only matter in controversy, and the evidence should be confined to this

to be determined by the court, and the statement
of errors is, first, whether the court stated the law
on the evidence, and, second, whether the finding of law
is against the weight of the evidence. When
V. 100, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

issue. Repley, v. Duke, 100 Ill.395; Stillman v. Bell, 134 Ill.532; Thomas v. Clemick, 237 Ill.167.

The only other ruling on the evidence that appellant complains of is that the court refused to consider on the hearing certain tax receipts offered by appellant which tended to show that during certain years preceding the bringing of this suit, Busch, had paid the taxes on the whole, or a part of the premises in controversy. We do not believe that this evidence was material, and even, if material, the offer of this evidence was not made in chief, but in rebuttal, and for that reason alone the court would have been warranted in refusing to consider the same, as this evidence if proper at all, should have been offered in chief.

It is insisted by appellant that August A. Busch went into possession of a tract of land containing a little over 190 acres under a deed from a man by the name of Timmermann on or about the 2nd day of June, 1905, and, that he has continued in possession of said premises from the date of said deed until the bringing of this suit. On the other hand, appellee insists that the possession of the premises in controversy has been in those through whom he claims more than sixty years.

~~The evidence further discloses that~~ [18] ^{defendant} ~~or sixteen years prior to the bringing of this suit~~ ~~appellee~~ went into possession of said premises under the LaValles, who gave him the right to occupy the same on his agreement to clear the land. ~~The evidence also is to the effect that an~~

100

Defendant

Appellee farmed a part of said premises and raised corn thereon which he sold at the vegetable market. After occupying said premises for a few years *defendant* went to Kansas City and stayed there ten years. He afterward returned and about eighteen months before suit was brought moved on the premises in question. He erected a house there, or as it is sometimes called by the witnesses, a shack, where the evidence discloses, *defendant* appellee was living at the time this suit was brought and at the time of the hearing.

~~It is contended by appellant that when appellee came back from Kansas City he applied to him for permission to cut some of the timber on the land occupied by appellant, being other than the land involved in this proceeding, and that appellant refused to allow him to do so, but it is not contended by appellant that he made any objection to appellee occupying the premises in controversy in this suit. Appellant's testimony was to the effect that while *plaintiff* ~~his~~ lease covered the 2.46 acres in controversy, he never had farmed it, or made any use of it, and in fact, the testimony of the witnesses, both on the part of appellant and appellee, is to the effect that ~~no~~ use whatever had been made of the 2.46 acres of land by *plaintiff* ~~appellant~~ under his lease.~~

~~The evidence is also to the effect that *defendant* ~~no~~ one molested appellee while building said house or in his occupation of said premises until this suit was brought, or under the holdings of the courts his entry was not a forcible entry. Neither does the evidence disclose that he is holding the possession of said premises wrongfully after having obtained peaceful possession thereof. For the preponderance of the evidence is to the effect that The Invalles through whom~~

transposed

and they are now residing in the city of Portland, Oregon.

This was brought up at the time of the hearing.
The witness was divided as to whether
to expect or call it the "Mystery," which he
stated in question. He reported a double discovery, so to
about eighteen months before the present time of the
City and at the same time. The witness testified that
Ying said something like a few years ago, but he could not recall
the exact words.

It is suggested by a Belfast friend that the
come back from which the British are now
to cut some of the lines of the land
being other than the one which is now
that appeared to be the only one to be
continued by the British. It is now
occasional the British in the north.
Laird's testimony as to the effect of the
and the fact in the north, he never
and the fact in the north, he never
and the fact in the north, he never

USE ON LEVER. AND OPEN WITH THE KEY AND Y-20

1000

[illegible]

1. The first of these is the fact that the

CONFIDENTIAL - SECURITY INFORMATION

[*Plaintiff*

ee's claims, have been in possession of said tract of land during all the time it was practical to have the possession of the same, being for more than sixty years prior to the bringing of this suit.]

It is claimed by appellant that he used this 200 acre tract fenced in and that appellee could not get to the premises occupied by him without going through this fence. The evidence on this controverted question - preponderates in favor of appellee, and to the effect that the fence was not maintained around the entire tract, and that appellee did not have to go through appellant's fence in order to gain admittance to said premises. This is not a proceeding to try the right of title, but is a possessory action, and the evidence clearly discloses that the trial court was fully warranted in finding the issues in favor of appellee on the controverted questions of fact.

The evidence further discloses that Fitzman who was acting as the agent of Busch attempted to purchase appellee's right to said premises, and offered to pay him \$300. therefor. It was contended by appellant that this was an offer of compromise, but the evidence, we think, preponderates to the effect that this offer was made before this litigation had commenced, or before it was seriously contemplated. At any rate it is a circumstance tending to show that appellee was not wrongfully in possession of said premises.

There being no serious error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

Handwritten signature/initials in a bracket.

...of the case, which for some time past has been
...[Handwritten bracket]

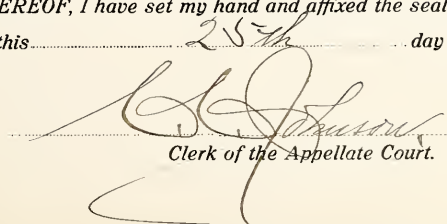
...the evidence on this character is...
...[Handwritten bracket]

...of the first point...
...[Handwritten bracket]

...to be treated in...

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 25th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

Page 1 of 1

=====



2367

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 46

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Ford Motor Co., etc.,
Appellant

ERROR TO
APPEAL FROM

vs.

No. 51
March Term, 1916.

Circuit COURT

Charles Fry,
Appellee

Wabash COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON

Term No. 51.

In the Appellate Court
of Illinois, Fourth District.

April 11, 1916

March Term, A. D. 1916

Ford Motor Co., for the use of)
John M. Royser, Appellant.)

vs.

Charles Fry, Appellee.)

) Appeal from Circuit Court
) of Tazewell County.

Opinion by Jones, J.

This is an appeal from the Circuit Court of Tazewell County from a judgment in favor of appellee, and against appellant for costs. The suit was originally instituted before a Justice of the Peace by John M. Royser in his own behalf. Judgment was rendered by the Justice against appellee from which judgment an appeal was taken to the Circuit Court of said County, and on leave of court, appellant, the Ford Motor Co., suing for the use of John M. Royser was substituted as plaintiff. A jury was waived in the Circuit Court, a trial was had resulting in a judgment in favor of appellee as above stated.

The evidence discloses that on or about June 11, 1915, John M. Royser, as Agent for appellant, at Mount Carroll, Illinois entered into a contract on behalf of appellant with appellee for the sale of a Ford automobile. Said contract among other things contained the following provisions:

"The (full retail list) is four hundred ninety

IN THE MATTER OF THE ESTATE OF JAMES H. HARRIS, DECEASED
 WILL
 JAMES H. HARRIS, DECEASED

JAMES H. HARRIS, DECEASED	{	JOHN A. HARRIS, Executor
		JOHN A. HARRIS, Executor
JOHN A. HARRIS, Executor	{	JOHN A. HARRIS, Executor
JOHN A. HARRIS, Executor	{	JOHN A. HARRIS, Executor

JOHN A. HARRIS, Executor

It is the duty of the executor to administer the estate of the deceased in accordance with the provisions of the will and the laws of the State of New York. The executor is required to collect the assets of the estate, pay the debts and liabilities, and distribute the remaining assets to the beneficiaries named in the will. The executor is also required to keep accurate records of the estate's affairs and to file reports with the court as required by law.

The evidence submitted in support of the executor's account shows that the executor has faithfully and honestly administered the estate of the deceased. The executor has collected all the assets of the estate, paid the debts and liabilities, and distributed the remaining assets to the beneficiaries named in the will. The executor has also kept accurate records of the estate's affairs and has filed reports with the court as required by law.

Dollars (\$490), plus freight and delivery charge of fifteen and 50/100 Dollars, (\$16.50) plus the amount, if any, of any present or future United States tax or excise upon or in respect of such automobile or sale thereof, making a total of Five hundred and nine and 50/100 dollars, (\$506.50) of which I agree to pay Twenty-five dollars (\$25.00) upon acceptance in writing of this order, and the balance of Four hundred eighty-one and 50/100 dollars (\$481.50), within forty-eight (48) hours after I have been notified by the Company through its duly appointed limited agent that automobile is ready for delivery.

I agree to accept automobile from Company within forty-eight (48) hours after notice that it is ready for delivery. Upon my failure to do so, the Company may dispose of it to another customer or otherwise, and the Company is not to be held liable for failure to deliver to me said automobile, and the above first mentioned payment made by me is to be retained by The Company, at its option, as liquidated damages for its expense and efforts in making resale of said automobile."

The evidence further discloses that the \$25.00 provided in the contract was paid by appellee to appellant and was retained by it. The assignment of errors present two principal questions. First, whether appellant on behalf of said John L. Keyser, its agent, can recover in this suit for the profits the said Keyser would have made as agent on the sale of said car to appellee, had appellee accepted said car and paid for the same under said contract; second;

[illegible][illegible]

whether or not appellant, the Ford Motor Company, having retained the \$25.00 paid by appellee to said company through its agent, John W. Keyser, and having re-sold the car tendered appellee to a third party on the same terms and conditions on which said sale was made to appellee, can recover any additional damages.

The evidence also discloses that after the above contract was entered into some conversation was had between appellee and Keyser, the agent for appellant, with reference to a self starter. It is contended by Keyser that appellee stated he would not purchase an automobile unless it had a self starter. Appellee says with reference to this conversation that he inquired of appellant how much a self starter would cost, and that appellant told him what it would cost, and appellee says he remarked, he could crank the car a long time for that amount. Without reference to which of these parties are correct as to this conversation, this fact is certain, that whatever conversation there was with reference to the self starter, it took place before the contract entered into between appellant and appellee was signed, and therefore all prior agreements would be merged in the written contract. *Keyser v. Belting*, 18 Ill. 222; *Adams v. Swan*, 100 Ill. 46; *Accident Company v. Yates*, 175 Ill. 124.

Paragraph 10 of the contract entered into by appellant and appellee is as follows: "The above comprises in full the entire agreement covering or pertaining to this sale, and no agreement of any kind, verbal understandings or promises whatsoever will be recognized other than as em-

bodied and specified herein, and no erratum or additions will be recognized unless approved of in writing hereon by the President or Vice-President of the Company. Is appellant then entitled to recover under his contract? The evidence discloses that appellee refused to accept the car tendered by appellant. Appellant insists that the reason appellee refused to accept the car is because he had changed his mind and concluded to purchase a car of a different make, while appellee insists that the car tendered by appellant did not comply with the contract for the reason that it was equipped with a self starter for which appellee through its agent was seeking to charge him. Without reference, however, to this reason therefore the evidence discloses that on his refusal to accept the car tendered by appellant, appellant through its agent, Keyser, re-sold the car on the same terms and conditions it had been sold to appellee. Keyser testified: "I sold the car I offered to deliver to Fry to Louis Reinhold under the same kind of a contract I have with Fry." This being the testimony of the agent of appellant, it is binding and conclusive on appellant. Under the provisions of paragraph two of the contract entered into between appellant and appellee on the refusal of appellee to accept the car, then on its resale by appellant to a third person on the same terms and conditions as sold to appellee, it limits the amount of damages which appellant can claim under the provisions of its contract to the sum of Twenty-five dollars.

It is admitted by appellant that it retained the

1. The first of these is the fact that the defendant, who is a resident of the State of New York, has been indicted by the grand jury of the County of New York for the crime of murder in the second degree. The indictment is dated and returned at New York, New York, on the 10th day of January, 1934.

2. The second of these is the fact that the defendant, who is a resident of the State of New York, has been indicted by the grand jury of the County of New York for the crime of murder in the second degree. The indictment is dated and returned at New York, New York, on the 10th day of January, 1934.

3. The third of these is the fact that the defendant, who is a resident of the State of New York, has been indicted by the grand jury of the County of New York for the crime of murder in the second degree. The indictment is dated and returned at New York, New York, on the 10th day of January, 1934.

4. The fourth of these is the fact that the defendant, who is a resident of the State of New York, has been indicted by the grand jury of the County of New York for the crime of murder in the second degree. The indictment is dated and returned at New York, New York, on the 10th day of January, 1934.

5. The fifth of these is the fact that the defendant, who is a resident of the State of New York, has been indicted by the grand jury of the County of New York for the crime of murder in the second degree. The indictment is dated and returned at New York, New York, on the 10th day of January, 1934.

6. The sixth of these is the fact that the defendant, who is a resident of the State of New York, has been indicted by the grand jury of the County of New York for the crime of murder in the second degree. The indictment is dated and returned at New York, New York, on the 10th day of January, 1934.

7. The seventh of these is the fact that the defendant, who is a resident of the State of New York, has been indicted by the grand jury of the County of New York for the crime of murder in the second degree. The indictment is dated and returned at New York, New York, on the 10th day of January, 1934.

8. The eighth of these is the fact that the defendant, who is a resident of the State of New York, has been indicted by the grand jury of the County of New York for the crime of murder in the second degree. The indictment is dated and returned at New York, New York, on the 10th day of January, 1934.

9. The ninth of these is the fact that the defendant, who is a resident of the State of New York, has been indicted by the grand jury of the County of New York for the crime of murder in the second degree. The indictment is dated and returned at New York, New York, on the 10th day of January, 1934.

10. The tenth of these is the fact that the defendant, who is a resident of the State of New York, has been indicted by the grand jury of the County of New York for the crime of murder in the second degree. The indictment is dated and returned at New York, New York, on the 10th day of January, 1934.

\$25.00 which appellee paid at the time said contract was entered into. Appellant therefore under the terms of its contract is foreclosed from any further recovery.

In an action by the vendor against the vendee of goods and chattels, for a refusal to accept and pay for them, if the vendor retain the goods and chattels, the measure of damages is the difference between the contract price and the market value, at the time and place fixed for their delivery. *Regley v. Hindlay*, 82 Ill. 324; *Wheat v. Bair*, 137 Ill. 43; *Smith v. Young*, 100 Ill. 170. And in case of a re-sale of goods and chattels the measure of damages is the difference between the contract price to the first purchaser and the price received on the re-sale. *White Walnut Coal Co. v. The Crescent Coal and Mining Co.*, 234 Ill. 268.

In the case last cited at page 176 the court says: "Where a re-sale has been made in good faith, after notice to the vendee, the difference between the net amount realized from such re-sale and the contract price is the proper measure of damages. The effect of the re-sale, when properly made, is to liquidate the damages and is conclusive upon both parties." The same doctrine is held in the case of *Hoarding Lumber Co. v. Lockitch Lumber Co.*, 120 Ill. 660.

Under the doctrine of the above cases, even though the measure of damages were not fixed by the terms of paragraph two of said contract, appellant would not be entitled to recover for any greater amount than the expense, if any, it was to in directing the re-sale of said automobile, it having been sold for the same price to his old as it had been sold to appellee for.

23. The which specified point of the line shall be marked and entered into the report. The report shall be made in the form of the following table:

It was also insisted by appellant that it had a right to recover in this case for the commission or profits its agent, Meyer, would be entitled to had it been accepted said automobile under said contract. No testimony has been submitted by appellant which supports its contention for the very good reason, we think, that there is none. On the facts as disclosed by the record in this case appellant could have no right of recovery on that ground.

Appellant further insists that the court erred in refusing to hold four propositions of law submitted by it as the law applicable in this case. We have examined these propositions of law and do not believe that the court erred in refusing the same. What we have said in this opinion sufficiently disposes of the legal questions involved in the propositions of law submitted by appellant and which were refused by the trial court. These propositions of law as submitted are directly opposed to the law governing this case as set forth in this opinion and the court committed no error in refusing the same.

Finding no reversible error in this record the judgment of the trial court is affirmed.

Judgment affirmed.

Not to be reported in full.

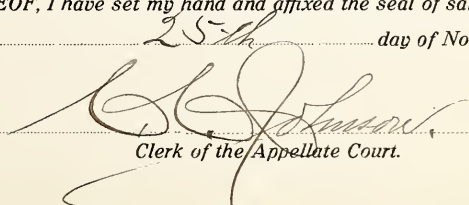
It was also pointed out that the
claim to recover in this case for the tortious act of
its agent, namely, the act of the driver, was
based upon the fact that the driver was acting
within the scope of his employment at the time of the
accident. On the facts as stated, the court found in
favor of the plaintiff and awarded him the sum of \$10,000.
The court also awarded him costs and interest on the
sum awarded.

Appellant's counsel argued that the court was
entitled to set aside its verdict on the ground that
the law applicable in this case, as stated by the
court, was in error. The court found that the
law stated by the court was correct and that the
verdict was supported by the evidence. The court
therefore affirmed the verdict of the jury and
awarded the plaintiff the sum of \$10,000 and
costs and interest thereon. The court also
awarded the plaintiff the sum of \$10,000 and
costs and interest thereon. The court also
awarded the plaintiff the sum of \$10,000 and
costs and interest thereon.

Appellant's counsel argued that the court was
entitled to set aside its verdict on the ground that
the law applicable in this case, as stated by the
court, was in error. The court found that the
law stated by the court was correct and that the
verdict was supported by the evidence. The court
therefore affirmed the verdict of the jury and
awarded the plaintiff the sum of \$10,000 and
costs and interest thereon. The court also
awarded the plaintiff the sum of \$10,000 and
costs and interest thereon.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 25th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....

2370

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 48

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Leonard Hoehn,

Appellee.

vs.

No. 52

March Term, 1916.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

East Side Levee & Sanitary

District,

Appellant.

TRIAL JUDGE

HON. LOUIS BERNREUTER

Term No. 52.

In the Appellate Court

March 10, 1913

of Illinois, Fourth District.

March Term, A. D. 1913

Leonard Koch, Appellee,

vs.

East Side Levee & Sanitary
District, Appellant.

Appeal from the Circuit Court
of Madison County.

Opinion by Rogers, J.

Appellant, the East Side Levee & Sanitary District, prosecutes this appeal from a judgment for \$171.50 rendered by the Circuit Court of Madison County in a suit brought by appellee, a tenant farmer for damages alleged to have been caused by a levee constructed by appellant, which obstructed the flow of the water from the premises occupied by him, thereby damaging his crops, etc.

~~The record discloses that~~ In the year 1910-1911 ^{defendant} ~~appellant~~ constructed a large canal one hundred feet wide at the bottom and ten feet deep with levees on both sides thereof ranging in height from ten to twelve feet and in width about fifty feet. This canal, commonly called the Cahokia Creek Diversion Channel, is about four and one half miles long and extends from its juncture with Cahokia Creek at a point where the St. Louis Railroad intersects the creek in Edwardsville Township, on the east, and runs due west to the Mississippi River; it is an artificial channel; does not follow any natural water course and is entirely outside

Form No. 12. In the County of ... State of ...
I, the undersigned, Clerk of the Court, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the Court.

Testimony of the Clerk of the Court.
Subscribed and sworn to before me this ... day of ... 19...
Notary Public for the State of ...

Witness my hand and seal this ... day of ... 19...

Notary Public for the State of ...
I, the undersigned, Notary Public for the State of ... do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the Court.

Testimony of the Clerk of the Court.

Subscribed and sworn to before me this ... day of ... 19...

Notary Public for the State of ...

said Sanitary District.

Appellee in his declaration, in substance, avers that when appellant constructed this diversion channel and the levee on the north side thereof it obstructed the natural flow of the water on the farm occupied by him and prevented it from draining off in the natural water course. It is further charged that appellant neglected and failed to place through and under its said north levee any opening or intake for the flood waters which naturally flowed there in times of heavy rains, and that appellant failed to provide any other suitable means for the escape of said waters, but on the contrary he constructed said levee along the south line of the land occupied by appellee that the waters were obstructed from their natural flow from the north to the south, thereby holding the same back on the lands occupied by appellee.

Appellee further charges that on the night of July 17, 1912, and again on July 18, 1912, a heavy rain storm occurred in that locality and large quantities of water fell on said farm so occupied by him and which said waters were obstructed in their natural flow by the north levee of the appellant and were held back and prevented from flowing away as they otherwise would have done, thereby inundating and destroying the crops of appellee and rendering his premises unsanitary.

To this declaration appellant filed a plea of not guilty and also a special plea setting up the act of the Legislature under which the defendant district was organized

and further north.

Special is the fact that, in general, the

fact that the mountainous region is the most fertile and

the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

is further north than the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

in the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

of the fact that the mountainous region is the most fertile and

and the ordinance

authorizing the construction of the Calokla Creek diversion channel. Application was filed to this special jury trial had by a jury resulting in a verdict on which judgment was rendered as above set forth.

The evidence discloses that appellant in order to protect the land and property within the limits of its district from the overflow and flood waters of Calokla Creek and its tributaries, diverted the waters of Calokla Creek into the Calokla Creek Diversion Channel, above described; that the levee constructed by appellant on the north side of said diversion channel was some ten or twelve feet high and extended entirely across the south line of appellee's lands. There were no openings or intakes into the channel nor was there any lateral ditch, drain or other provision made for the surface waters which naturally come there in times of heavy rains.

The evidence further discloses that the land occupied by appellee was not included in said drainage district and no part of said diversion channel or levee were constructed on appellee's lands, but were immediately south thereof on the right of way occupied by appellant. On July 13, 1912, appellee with his family was residing on the premises above mentioned which he was farming in corn, oats, potatoes and truck gardening. The evidence discloses that the potatoes were matured and ready to dig; a small amount having been dug; the oats were ready to cut and the corn and timothy hay were growing and in good condition. A heavy rain fell that night in that vicinity and the water in large part covered the farm occupied by appellee. In some places

and the evidence
A. and the evidence is the same as the evidence in the
evidence. The evidence is the same as the evidence in the
and by a jury returning in a verdict on the evidence and
rendered as above the facts.

There is no doubt that the Government is doing its best to protect the land and people of the district from the ravages of the flood. The Government is doing its best to protect the land and people of the district from the ravages of the flood. The Government is doing its best to protect the land and people of the district from the ravages of the flood.

On October 19, 1944, the following information was received from the Bureau of the Census, Washington, D. C., regarding the above-named individual:

The individual named above was born on October 10, 1914, at New York City, New York, and is now residing at New York City, New York. He is a single man, and is a member of the New York City Police Department. He is a native-born American citizen, and is a member of the New York City Police Department. He is a single man, and is a member of the New York City Police Department. He is a native-born American citizen, and is a member of the New York City Police Department.

the water was from sixteen inches to two feet deep on appellee's premises. On the 15th of said month there was another heavy rain in that vicinity and water remained on the premises of appellee for something like fifteen to twenty days, thereby wholly destroying a part of the crops of appellee and greatly damaged the residue. The evidence further tends to prove that the weather during the time immediately following the flooding of said lands was hot and that the premises of appellee became unsalutary and unhealthful on account of said standing water, and that said water remained on said premises until it evaporated or sank into the ground.

The evidence also discloses that subsequent to said rain fall appellee constructed a lateral ditch along the north side of said north levee which thereafter drained the surface water falling on the lands of appellee and others, directly into the Mississippi river.

The record is further to the effect that the lands owned by appellee were quite flat and that near the levee along said diversion channel the lands were slightly higher than they were further north on appellee's land. The evidence, however, tends to prove that the lands near said levee were not sufficiently high to cause any serious obstruction to the flow of the water from appellee's lands in a southerly direction prior to the construction of said levee. We think the clear preponderance of the evidence is to the effect that prior to the construction of said diversion channel and the levee along the north side thereof the

[illegible]

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation.

The second is that it is not clear from the evidence whether or not the defendant was aware of the fact that the victim was a minor.

waters from appellee's land flowed off in a southerly direction and that prior to the construction of said diversion channel and said levee, the waters from heavy rains had never caused serious damages to the crops of appellee. The evidence further tended to prove that the water never stayed on appellee's land at any great length of time prior to the construction of said levee. It was, therefore, a question of fact for the jury as to whether or not the levee constructed by appellant along the south line of appellee's land did in fact obstruct the flow of the water therefrom as charged in appellee's declaration, and as the evidence tended to prove the allegations thereof we are not able to say the finding of the jury is against its manifest weight. In fact, we are of the opinion that the evidence preponderated in favor of appellee's contention to the effect that said levee did so obstruct the flow of said water.

It is contended by appellant among other things that no legal duty rested upon it to refrain from obstructing the flow of surface water from the premises of appellee and that no legal duty rested upon it to provide an outlet for such waters. This is not an open question with this court. In the case of *Handwerker v. The East Side Levee and Sanitary District* (appellant here) on July 31, 1915, we rendered an opinion in which this question was gone into and was passed upon. Among other things this court in discussing the contention that appellant would not be liable for obstructing of the flow of said surface water says: "We cannot agree with this contention. It would hardly be reasonable to say that

This conclusion, I would readily be inclined to accept
 of the line of safe action to be pursued in the
 future. I am, however, not at all sure that the
 opinion is correct which is expressed in the
 report of the Committee on the subject of the
 proposed amendment to the Constitution of the
 United States. I am not at all sure that the
 proposed amendment is a wise one, and I am not
 at all sure that it is a necessary one. I am
 not at all sure that it is a wise one, and I
 am not at all sure that it is a necessary one.

because appellant was organized for the express purpose of 'draining property, protecting it from injury, and for sanitary purposes.' It was authorized to create, under its charter, the exact conditions which it was bound to follow, and secure liability therefor." In the case of *Bradbury v. Verbalis* (1884) 100 Cal. 36, we further say: "If an individual owner of land were the party who controlled the land, the law would be different. He would be liable for the consequences of his acts. He would have no right to build a levee which would prevent the escape of flood waters and thereby flood the lands of his neighbor. . . . The right of the owner of the neighbor's land to drain, if based simply on the right that nature has ordained such drainage, and if it is plain and natural justice that the individual ownership existing free of social laws should be held in accordance with the existing laws and customs of society. As water flows and goes down in rivers it is not to be controlled. If a land is held under the artificial title created by human law, there can only be one other rule of law to regulate and so only of application as that which enforces natural laws."

Upon this question, the courts of this state have applied the rule of the civil law, and used the rule that the right of drainage is governed by the law of water, and the lower proprietor cannot do anything which prevents the natural flow of surface water and cast it back upon the land above; and no distinction is recognized between surface water and flood water. For in such natural water-courses, *Wheeler v. the West Side Force & Sanitary District*.

Bradbury v. Randall's Drainage Dist. supra.

It is further held in the case of Bradbury v. Randall's Drainage Dist. supra, "that an accumulation of land surface water by artificially obstructing the drainage conveyed by a levee & drainage lot, organized a district and erect a levee which obstructs the natural flow of the water and injures the land of another without exercising a title thereto."

It is next contended by appellant that the court erred in allowing appellee to offer evidence to the effect that after the said rains in July 1912, appellee constructed a lateral ditch along the north side of said levee and immediately south of appellee's land whereby the surface water falling on said land and on the public highway to the east of said land was drained into the Mississippi River. It is insisted, that this ditch having been constructed after the injury complained of, the evidence admitted was not proper to be considered by the jury in determining the issues in this case. Whether or not the court erred in admitting this evidence cannot be raised by appellant for the reason that H. B. Morgan a civil engineer who testified on behalf of appellant stated on direct examination that appellee during the fall of 1912 constructed a ditch along the north side of the levee complained of and adjoining appellee's land and that the same continued westerly along the right-of-way out to the edge of where the brook is that goes down into the Mississippi bottom property; that the ditch was dug at the request of the highway commissioners of Madison township

for the purpose of draining their land to the north of the diversion channel and in the vicinity of the main house.

It was also contended by appellant that the court erred in permitting appellee to offer testimony to the effect that while there were levees provided along the lands of appellee, or the scope of the system with falling thereon into the diversion channel constructed by appellant, that such levees were provided by appellant at other points along the line of said channel, it being insisted that this question is included in the scope of the charges made by appellee is that the diversion channel and the levee constructed by appellant was not constructed in a proper manner and that provision should have been made for the scope of the waters falling on appellee's land as to act to obstruct the flow therefrom. We reject this evidence as immaterial under this averment of appellee's declaration and is in keeping with the holding of this court and of the supreme court in the cases above cited.

It is also contended by appellant that the construction of the diversion channel and the levee being a permanent structure, that whatever damages were sustained by reason thereof as to the lands occupied by appellee, must be recovered in one action. Appellee is not the owner of the land occupied by him, but is a tenant at will, and as no part of said lands were taken for the purpose of the construction of said diversion channel and said levee on the north side thereof adjoining the land occupied by appellee, appellee therefore would have no right of action until he had been damaged. That being true no right of action would

[illegible]

acquire to repulse until such damage occurred and then it occurred he would have a right to recover damages. *Stender v. The East Side Levee and Drainage District*, 100 La. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In *Stender v. Levee District*, 100 La. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It is also indicated that the court found in admitting testimony to the effect that a rain in the summer of 1915 which the evidence tended to show was equally as heavy as the rain complained of in July 1914 flowed over through the ditch constructed by appellant on the north side of its levee in sufficient time so as to not cause any material damage to appellee's land. The said finding, as indicated by the witnesses testified with reference to the construction of this ditch after the injury complained of and while they do not believe that this evidence should have been admitted, at the same time we are of the opinion that the finding error was committed by

the court or that that evidence had any material effect on the finding of the jury. The verdict is well drawn, as far as the damages are concerned, so that it is suggested by the evidence, in fact, no responsibility is to be laid on the fact that the damages are excessive. But since, then, the error in the admission of the above testimony is shown to have a reversal of the case.

It is not suggested by counsel that the court erred in giving the first, fifth and sixth instructions given on behalf of appellee. The only complaint made as to the first instruction is that it is incorrect in law and that it has a tendency to mislead the jury. This instruction states that the deceased was negligent in the fact that he was and there was no error in the court giving it. The only complaint made of the fifth and sixth instructions is given on behalf of appellee is that these instructions do not limit the damages to those caused in the declaration. We have examined these instructions and would they may not be as perfect as they should, we do not believe that there was any reversible error committed by the court in the giving of the same. Especially so this so when these instructions are taken in connection with the instructions given on behalf of appellant, at least four of which directly instructed the jury with reference to the burden of proof which should govern the jury should they find for appellee. The court, we think, fully protected the rights of appellant in the giving of the instructions. Different instructions were given by the court on behalf of appellant which covered every theory of

the world is that the knowledge of the human mind is
the result of the senses, and that the mind is a blank
slate at birth, and that all knowledge is derived from
experience, and that the mind is a tabula rasa.
This is the doctrine of the empiricists, and it is the
basis of the philosophy of the eighteenth century.
The empiricists held that the mind is a blank
slate at birth, and that all knowledge is derived
from experience. They held that the mind is a
tabula rasa, and that the senses are the only
source of knowledge. This doctrine was
opposed by the rationalists, who held that
the mind is not a blank slate at birth, but
that it contains innate ideas. The rationalists
held that the mind is a pre-existing structure,
and that the senses only provide the material
for the mind to work upon. The empiricists
held that the mind is a blank slate at birth,
and that the senses are the only source of
knowledge. The rationalists held that the
mind is a pre-existing structure, and that
the senses only provide the material for the
mind to work upon. The empiricists held
that the mind is a blank slate at birth, and
that the senses are the only source of
knowledge. The rationalists held that the
mind is a pre-existing structure, and that
the senses only provide the material for the
mind to work upon.

the appellant's case which was warranted by the law.

This case in its facts is very similar to the case of Handfelder vs. The West Side Lumber and Lumbering District, supra. and the same rule should be applied as controlling authority here.

The judgment of the lower court is hereby affirmed.

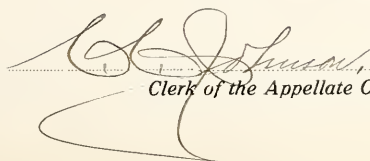
Respectfully,
J. H. H. H. H.

Not to be repeated in full.

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this..... 17th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....



2372

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 58

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

H. T. Miller and Homer Miller,

Appellees.

vs.

No. 63

March Term, 1916.

George W. Mayberry, et al,

Appellants.

ERROR TO
APPEAL FROM

Circuit COURT

Wayne COUNTY

TRIAL JUDGE

HON. JULIUS C. KERN



Term No. 67.

In the Appellate Court

Wanda No. 12

of Illinois, Fourth District.

March Term, A. D. 1918.

E. W. Miller and
James Miller,

Appellees.

vs.

George W. Layberry,
J. W. Layberry and
J. E. Wright,

Appellants.

Appeal from the Circuit Court
of Wayne County.

Opinion by Jones, J.

This is an appeal prosecuted by appellants from a judgment for \$1700.00 rendered against them in the Circuit Court of Wayne County, Illinois, in an action in assumpsit brought by appellees. [The declaration consisted of the common counts and the special count. The special count was based on the alleged failure of defendants to carry out the following contract. Plaintiff agreed to give to G. W. Layberry and J. E. Wright to exchange all acres of land located in White County, Arkansas, formerly owned by G. W. Layberry, title now vested in G. W. Layberry, and to be conveyed by G. W. Layberry by a warranty deed, and also an abstract showing a good and mercurantile title and clear of incumbrance, and take in exchange from J. E. Wright seven head of mules ranging in age from one to three years old and six head of horse colts one year old, and one dwelling house and lot]

The first part of the paper is devoted to a general
 discussion of the problem. It is shown that the
 problem is of great importance in the theory of
 functions. The second part is devoted to a
 detailed study of the problem. It is shown that
 the problem is of great importance in the theory of
 functions. The third part is devoted to a
 detailed study of the problem. It is shown that
 the problem is of great importance in the theory of
 functions. The fourth part is devoted to a
 detailed study of the problem. It is shown that
 the problem is of great importance in the theory of
 functions. The fifth part is devoted to a
 detailed study of the problem. It is shown that
 the problem is of great importance in the theory of
 functions. The sixth part is devoted to a
 detailed study of the problem. It is shown that
 the problem is of great importance in the theory of
 functions. The seventh part is devoted to a
 detailed study of the problem. It is shown that
 the problem is of great importance in the theory of
 functions. The eighth part is devoted to a
 detailed study of the problem. It is shown that
 the problem is of great importance in the theory of
 functions. The ninth part is devoted to a
 detailed study of the problem. It is shown that
 the problem is of great importance in the theory of
 functions. The tenth part is devoted to a
 detailed study of the problem. It is shown that
 the problem is of great importance in the theory of
 functions.

Term No. 63.

In the Appellate Court
of Illinois, Fourth District.
March Term, A. D. 1916.

Agenda No. 12

L. V. Miller and
Eugene Miller,

Appellees.

vs.

George W. Hayberry,
J. W. Hayberry and
J. H. Wright,

Appellants.

Appeal from the Circuit Court
of Wayne County.

Opinion by Jones, J.

This is an appeal prosecuted by appellants from a judgment for \$1700. rendered against them in the Circuit Court of Wayne County, Illinois, in an action in assumpsit brought by appellees. [The declaration consisted of the common counts and one special count. The special count was based on the alleged failure of ^{defendants} to carry out the following contract. I hereby agreed as agent for G. W. Hayberry and J. H. Wright to exchange 100 acres of land located in White County, Arkansas, formerly owned by G. W. Hayberry, title now vested in G. W. Hayberry, and to be conveyed by G. W. Hayberry by a warranty deed, and 1/4 of an abstract showing a good and merchantable title and clear of incumbrance, and take in exchange from L. V. Miller seven head of mules ranging in age from one to three years old and six head of horse colts one year old, and one dwelling house and lot]

located on Main street in Jeffersonville, Illinois, to be conveyed by a Warranty Deed and abstract showing a good marketable title, reception to said land is investigated not to exceed ten days from this date, September 10, 1913. (Signed) J. S. Keyberry and E. J. Miller."

One of the general issues was filed with notice of special venire. It is not to be tried on March 2, 1914, but was continued from term to term until the October term, 1913, when a jury was impanelled and a trial had before the court resulting in a judgment in favor of appellant as above set forth.

Propositions of law were submitted to the trial court so that the only question to be determined on this appeal under the assignment of errors in this case are, first, whether the court erred in its rulings on the admission and refusal of evidence; second, whether the competent evidence in the record is sufficient to sustain the findings and judgment of the trial court. *Green v. Harrison*, 188 Ill. 301; *Robert v. Harrison's Estate* 188 Ill. 312.

The first question can be disposed of by saying that the evidence objected to by appellants, and which was admitted was heard by the court subject to objection and the trial being had by the court without a jury, it is to be presumed that the court duly considered the competent evidence admitted in the hearing, and if the competent evidence in the record is sufficient to sustain the findings and the judgment of the court, it is sufficient, notwithstanding the reception of the incompetent evidence, as the same harm-

~~trial effect does not follow in such a case, as when the trial is before a jury. *Wolser v. Britania Co.* 128 Ill. 508; *Chroeder v. Harvey*, 75 Ill. 638; *Strick v. Ryan*, 184 Ill. 347.~~

Coming now to the second proposition as to whether or not the competent evidence in the record is sufficient to support the findings and judgment of the trial court, the evidence discloses that Pursuant to the execution of the contract declared on in the trial court of the declaration, ~~plaintiffs~~ defendants delivered to ~~plaintiffs~~ the sales and costs mentioned therein and executed a deed conveying the dwelling house in Jeffersonville, Illinois, mentioned in said contract, to ~~defendant~~ defendant and Bank, U. S. Trust, which deed by agreement was placed in escrow in the First National Bank of Wayne City, Illinois. On the same day, ~~defendant~~ defendant by attorney executed a deed to ~~plaintiff~~ plaintiff for the same land mentioned in said contract, which said deed was also placed in escrow in said bank. The evidence further discloses that Possession of the Jeffersonville property conveyed to ~~defendant~~ defendant was at said time delivered to said ~~defendant~~ defendant and the rents thereon were collected by him. ~~defendant~~ defendants thereafter on or about the 27th of October 1917, delivered to ~~plaintiff~~ plaintiff H.T. Miller, an abstract of title to the Jefferson land. An examination of this abstract disclosed that ~~plaintiff~~ defendant George H. Snyder, did not have a merchantable title. Objections were made to the title as disclosed by the abstract and the abstract returned to ~~defendant~~ defendants and was in their possession until about January 7, 1918, when ~~plaintiff~~ plaintiff H.T. Miller

THE FIRST PART OF THE REPORT IS A SUMMARY OF THE
WORK DONE DURING THE YEAR. THE SECOND PART
CONTAINS A DETAILED ACCOUNT OF THE
PROGRESS OF THE RESEARCH.

THE RESULTS OF THE RESEARCH ARE
SUMMARIZED IN THE FOLLOWING TABLES.
THE FIRST TABLE GIVES A SUMMARY OF THE
DATA OBTAINED. THE SECOND TABLE
GIVES A DETAILED ACCOUNT OF THE
RESULTS OF THE RESEARCH. THE
THIRD TABLE GIVES A SUMMARY OF THE
CONCLUSIONS DRAWN FROM THE
RESEARCH. THE FOURTH TABLE
GIVES A SUMMARY OF THE
RECOMMENDATIONS MADE.

negotiated with one Wiley Harris for an exchange of the Arkansas land with said Harris for certain real estate owned by Harris. ~~appellee~~ ^{Plaintiff} T. Miller with said Layberry went to the bank where the deeds were deposited and procured Mr. [unclear] the cashier of the bank to deliver said deeds to appellee, Miller, and the said, E. V. Layberry. A contract was then entered into between ~~appellee~~ ^{Plaintiff} Miller and said Harris for an exchange of the Arkansas land for the property owned by Harris, which said contract was drawn by the said E. V. Layberry and was signed by ~~appellee~~ ^{Plaintiff} Miller and Harris and was left in the custody of said bank. Said contract between ~~appellee~~ ^{Plaintiff} Miller and Harris, being as follows: "This contract made and entered into this Jan. 7, 1914 by and between T. F. Miller hereinafter designated as the party of the first part and Wiley Harris hereinafter designated as the party of the second part, witnesseth: That the party of the first part has agreed to convey or cause to be conveyed a cert in 100 acre tract of land in White County, Ark. formerly owned by Geo. W. Layberry to be clear of inc. and conveyed by Warranty Deed with an abstract furnished showing a good merchantable title.

The party of the second part has agreed to convey by Warranty Deed and furnish an abstract showing a good merchantable title to the following [unclear] property, to-wit: NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Sec. 24, Twp. 1, Range 6 E. in Wayne Co. Ill. subject to [unclear] and that the party of the second part agreed to give a mortgage to the party of the first part for \$7,000 due in two years at 6 per cent int. payable annually on the Arkansas land above described. It

is further agreed that time is the essence of this contract and that the deed shall be transferred or placed in escrow not later than Jan. 1st, 1914. That each party shall have a reasonable time to examine and prepare abstracts. (Signed) J. W. Miller (deaf) Wiley Harris (deaf)."

On January 3, 1914, a deed from ~~appellant~~ ^{defendant}, George W. Mayberry to Wiley Harris for the Arkansas land was placed in escrow in said First National Bank of Wayne City with said contract. Thereafter, ~~appellant~~ ^{defendant} failed to correct the defects shown in said abstract to the Arkansas land. Whereupon said Harris notified the cashier of the Wayne City Bank that the abstract had not been furnished and to return the deed to George W. Mayberry and in compliance with said notice said cashier returned said deed to said ~~appellant~~ ^{defendant}, George W. Mayberry. Upon receipt of same Mayberry mailed said deed back to said bank and thereafter on the direction of ~~appellee~~ ^{plaintiff}, J. W. Miller, the cashier of said bank again mailed said deed to ~~appellant~~ ^{defendant}, George W. Mayberry, who again mailed it to said bank where it remained up to the time said suit was tried.

~~It was a contested question on the trial as to whether said deed from George W. Mayberry to Wiley Harris was returned to Mayberry before the suit was instituted. The evidence on the part of appellees is to the effect that about three or four weeks after the deed was delivered to the bank, that is after Jan. 3, 1914, Harris directed the cashier of said bank to return the deed to the appellant, George W. Mayberry, and that this was done, while the evidence on the part of appellants tends to show that said deed was not returned to appellant, George W. Mayberry, until the 7th day of~~

March 1, 14, five days after this suit was instituted. We think, however, on this contested question the court was warranted in finding that the deed was returned to appellant, Layberry, prior to the bringing of this suit. At any rate, the finding of the court on this contested question was not against the manifest weight of the evidence, and this is all we are required to determine. *Village of Raymond v. Ray*, 130 App. 173; *Wideman v. Town of Antioch* 109 App. 291.

It is not insisted by appellants that the abstract furnished by them was a merchantable abstract or that they made it so prior to the bringing of this suit. It is also insisted by appellants that even though they failed to furnish said abstract as agreed, the making of the contract between appellee, Miller, and Clyde Harris terminated the contract between appellants and appellants, and the right of action, if any, for the failure of appellants to comply with their contract to furnish a merchantable abstract is in Harris and not in appellee. We think, on a careful examination of the record on this question that the trial court properly found that the contract between appellees and appellants was not obligated by the contract entered into between appellee, Miller and said Harris.

The testimony tended to show that the contract entered into between appellee, Miller and the said Harris was a conditional contract, depending upon the carrying out of the contract on the part of appellants to furnish a merchantable abstract for the Arkansas property. If this be true,

then appellants would not be relieved from the obligation on their part to furnish such abstract merely by reason of the contract between appellee, Miller and said Harris. That appellants did not consider the contract between them and appellees as terminated by the contract between appellee, Miller, and Harris, is disclosed by reason of the fact that after the making of said contract on or about the first day of March, 1914, and before this suit was instituted, E. J. Seyberry, who was acting for appellant, called appellee, Miller, on the phone and told him he had gotten a letter from the abstractor and that the title to the Arkansas land "could not be straightened out except by suit in court." Thereupon, Miller stated to him that he did not think a chancery court could straighten it out and asked him to make settlement. Seyberry replied he was going to see that he, Miller, took the Arkansas land.

No question is made in the assignment of errors or in the argument of counsel with reference to the amount of the verdict.

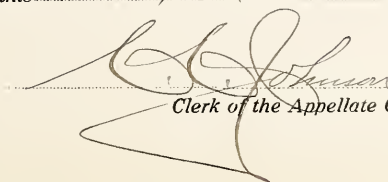
There being no serious errors in the findings or judgment of the trial court, the same is affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this.....16th..... day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....

2373

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 60

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Seth Powell,

Appellee.

~~ERROR TO~~
APPEAL FROM

vs.

No. 64

City COURT

March Term, 1916.

East St. Louis COUNTY

Alton & Southern Railroad,

Appellant.

TRIAL JUDGE

HON. ROBERT H. FLANNIGAN

Term No. 64.

In the Appellate Court

March Term, 1916.

of Illinois, Fourth District.

March Term, A. D. 1916.

Beth Lovell, Appellee

vs.

Alton & Southern Railroad,

Appellant

Appeal from the City Court

of East St. Louis, Illinois.

Opinion by Jones, J.

An action on the date was brought by appellee, Beth Lovell, against the Alton & Southern Railroad, appellant, to the September term, 1915, of the City Court of East St. Louis.

The declaration consisted of one count in which it was alleged in substance, that ~~appellee~~ ^{defendant}, on or about the first day of

November, 1914, built a railroad and thereafter operated trains thereon along and near the property of ~~appellee~~ ^{plaintiff}; that ~~appellee~~ ^{defendant}

ran heavy locomotives and loaded and empty freight cars

on said track, and by reason of the track being so near to ~~appellee~~ ^{plaintiff's}

property great damage was done by the stopping and starting of said locomotive and cars; that the motion of

the locomotive and train jolted and shook the earth of the lot belonging to ~~appellee~~ ^{plaintiff} to such an extent as to cause the

stone foundation of his house to crack and crush, and has

caused the house to settle and become distorted and twisted;

that the doors will not shut and latch properly; that the

windows can be raised or lowered only with great difficulty;

that the plastering and paper is cracked and broken and on

Journal of Management Studies, 2006; 43(7): 981-995

3317

1. *Case 1* 2002

31

[account of the smoke, soot and dust from the passing trains it is necessary to keep the doors and windows closed as tightly as possible; that on account of the conditions which have been created and resulted from the building of the railroad, Plaintiff's ~~appellee's~~ property has been changed from desirable residence property into property that is wholly unfit for residence purposes, and is now greatly reduced and depreciated in value, and ~~these damages of \$1000.~~] The case was set aside. The cause was tried at the November Term, 1914, the jury returning a verdict in favor of appellee for \$75.00. A motion for a new trial was overruled, and judgment entered on the verdict, from which judgment this appeal is prosecuted.

It is first contended by ~~appellee~~ for a reversal of the judgment in this case that the verdict is against the manifest weight of the evidence. The record discloses that Plaintiff's ~~appellee's~~ property consists of a single lot with a frontage of 36 feet and a depth of 180 feet, on which is a one story frame cottage, 28 feet by 28 feet in size, with stone foundation and shingle roof, situated in the eastern part of the city of East St. Louis, on forty-third street, at the outer edge of the built-up portion of the city. Defendant ~~appellee~~ owns a belt line steel railroad about ten miles in length, beginning at the Mississippi River near the out-skirts of East St. Louis, and extending in a northerly direction partially around the city. This railroad ~~is~~ ^{was} distant about 230 feet from Plaintiff's ~~appellee's~~ property, and was constructed about the year 1912.

The court overruled question in the case, and is]

[whether or not appellee's property was damaged and its market value depreciated by reason of the operation of ^{defendants} ~~a~~ line of railroad past his premises. The evidence on this controverted question was sharply conflicting.] Appellee's evidence tended to show that appellant in the operation of its trains did a great deal of starting, stopping and switching of its cars near his premises, and that the ground was caused to vibrate to the extent that it resulted in the cracking of the walls of the foundation and the plastering in his residence, and also that the frame work was warped and twisted so that the doors and windows could not be opened and closed without great difficulty.

Appellee's evidence further tended to show that smoke and soot from the trains operated by appellant came into the house when the wind was from that direction, so that frequently the doors and windows would have to be closed by reason thereof. The evidence of appellee's witnesses was further to the effect that the market value of his property was depreciated by reason of the foregoing conditions. The difference in the market value resulting from said condition was variously estimated by appellee's witnesses, running from \$300.00 to \$700.00 or \$800.00.

On the other hand, appellant's evidence tended to show that the City of East St. Louis is a manufacturing city with a large number of manufacturing plants and railroads; that smoke and soot in large quantities were and during the time in question in this suit always could be found in all

1. The first of these is the fact that the
 2.

portions of the city; that the smoke and soot at appellee's house and at places in the immediate neighborhood nearer to the railroad than appellee's property were not noticeable, and did not interfere with the use of the property, and that there was no appreciable vibration from the operation of the railroad at appellee's house, or at places in the immediate neighborhood similarly situated, and that the benefits from the belt line railroad were then offset the damages caused by it, and that appellee's property had not depreciated in value by reason of the construction and operation of the railroad.

After a careful examination of the evidence in the case we are unable to say that the verdict of the jury is against the manifest weight of the evidence and unless we can do so we should not disturb the verdict, unless other errors in the record require us to do so. Carrigan v. Hardy, 46 Ill. 502; Ogilvie v. Copeland, 148 Ill. 98; Berghoefer v. Premier, 150 Ill. 577.

It is next insisted by appellant that the court erred in giving to the jury appellee's second and third instructions. Appellee's second instruction purports to instruct the jury in reference to the method to be pursued by them in determining appellee's damages, provided they find his property damaged. This instruction in our opinion does not give the jury the correct method for determining the damages to property in this class of case. The true measure of damages is the difference in the fair cash market value of the property before and after the construction and

operation of the road complained against. *Brand v. Union*
elevated N. H. Co. 250 Ill. 133; *McCoy v. Union* elevated N. H.
Co. 271 Ill. 430. The instruction in question merely directs
the jury if they find that a palmer's property has been
damaged to fix such damages as they may find them from the
evidence. If this instruction were the only instruction to
the jury in reference to the method of determining damages
we would be inclined to reverse the case on that ground. The
court, however, gave to the jury on the request of appel-
lant at least four instructions which in varying language
told them that if they found from the evidence that the
premises of appellee was worth as much or more after the
construction and operation of appellant's line of railroad
as it was worth before, then he would not be entitled to re-
cover. We do not therefore think that the giving of this
instruction constituted serious error. It did not direct
a verdict, and was, we think, supplemented and cured by other
instructions. The instructions given by the court are to
be read and considered together, and in when so considered,
they state the law applicable to the case with substantial
correctness it is sufficient. *State N. Co. v. N. H. Co.*
190 Ill. 246 Ill. 50; *Walter v. Union*, 200 Ill. 560; *Fuller v.*
Widgird, 198 Ill. 76.

[*Plaintiff's* ~~third~~ ^{was} instruction] is as follows: "The
jury are instructed that the preponderance of evidence in
a case is not alone determined by the number of witnesses
testifying to a particular fact, or set of facts. In
determining upon which side the preponderance of the evidence

[is, the jury should take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances proven on the trial; and from all these circumstances determined upon which side is the weight or preponderance of the evidence.] This instruction should have included the number of witnesses as one of the elements to be considered by the jury in determining where lies the preponderance of the evidence, but we do not think its failure to do so in this case was such an error as to require a reversal.

While perhaps a few more witnesses may have testified on the part of appellant than did on the part of appellee, on the controverted questions in this case, still the difference in numbers was not marked and was not of sufficient importance to make the error in the instruction serious.

Practically this same instruction has been passed upon by the Supreme Court, and it has been held not to be reversible error to give the same, except where the element of the number of witnesses is shown to be important. *W.J. & A. Co. v. Taylor*, 179 Ill. 611; *West Chicago v. Ruscovitz*, 187 Ill. 612.

Only three instructions were given by the court at the request of appellee, while nine instructions were

given at the instance of appellant, and these instructions fully presented appellant's theory of the case to the jury.

Appellant further contends that certain exhibits offered by it and which were refused by the court should have been admitted and that their refusal constituted error. These exhibits consisted of scribbles made on a card by one of the witnesses with a machine invented by him by which he claims to be able to record vibration caused by moving trains, etc. However, we do not think any serious damages resulted to appellant by reason of such refusal or this witness in his testimony was allowed to give the results of his tests to the jury.

Finding no reversible error in this record the judgment of the trial court is affirmed.

Affirmed.

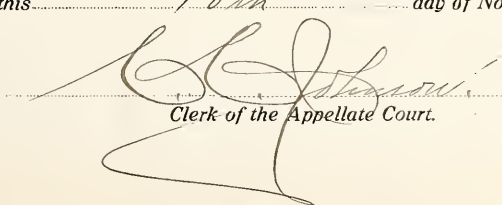
Not to be reported in full.

fully presented scientific theory of the world and man.

1110

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....

2376

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 77

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Hummel & Needs,

Appellants

ERROR TO
APPEAL FROM

vs.

No. 72

Circuit

COURT

March Term, 1916.

Crawford

COUNTY

C. F. Freshwater, et al.

Appellees

TRIAL JUDGE

HON. CHARLES H. MILLER

Term No. 78.

In the Appellate Court
of Illinois, Fourth District.
March Term, 1914.

J. J. Lummel and J. Needs,
Co-partners doing business
as Lummel & Needs,
Appellants

vs.
William C. Barnes and
Henry M. Schuder, Defendants.

C. F. Freshwater, (J. J. Barnes,
v. M. Schuder, Henry M. Schuder,
and Louis Lindenberg, Appellants,
doing business as the
Lawrenceville Salvage Company,
appellants; the Western Lumber &
Licking Company, a corporation,
and the Independent Lumber
Company, a corporation,

vs.
the Circuit
Court of Crawford County,
Illinois.

~~all of~~
the above.

Opinion by Barnes, J.

Appellee, W. C. Freshwater, being the owner of certain oil leases in Robinson, Illinois, he was engaged in the business of drilling and operating oil wells, and about the 15th day of March 1914, entered into a contract with J. J. Barnes, H. M. Schuder and to the officers of the Lawrenceville Salvage Company to drill and complete a well on the lots in question in Robinson, Illinois, with the understanding that after he completed such well, appellees were to purchase a one fourth interest respectively in the same for the sum of six hundred dollars. The contract of purchase between appellees, Barnes and Schuder was oral. The contract with the Lawrenceville Salvage Company was in writing, being dated March 20, 1914. This contract was made after its

Page No. 75.
in the Appendix to the
of the Committee on the
of the Committee on the

... ..
... ..
... ..
... ..

C.F. Frothingham, Jr.,
C.M. Sander, H.W.
and J.C. Sander,
and J.C. Sander,
and J.C. Sander,
and J.C. Sander,
and J.C. Sander,

1. 1900-1901

execution placed on record in the recorder's office of Crawford County, Illinois.

Appellee, C. T. Freshwater, after the making of the contract with appellees and including appellees with a contract with the Western Supply and Drilling Co., for the furnishing of supplies for said well, and with appellees, Russell & Needs, for the drilling of said well, and with the appellee, Independent Torpedo Company, for the shooting of the same. The well was completed, put and put in operation on or about the 11th day of April 1911, and was pumping oil on the 13th day of April 1911, when the same was examined by appellees, appellees and appellees and upon such examination an assignment for a one fourth interest in the same was made by appellee, Freshwater, to appellees respectively, and the contract price therefor was paid. Appellee, Freshwater, it appears was unable to pay the obligations incurred by him for the drilling of said well, and for the supplies incident thereto, and on the 4th day of August, 1911, appellees filed their statement of lien in the recorder's office of Crawford County, Illinois, and thereafter brought suit in the Circuit Court of said County to enforce their said lien. A receiver was appointed by the court and at the September term, A. D. 1911, on the petition of said receiver, the receiver was ordered by the court to shut in the well, remove the rods, tubing, casing, etc. from said well and to remove all the materials so removed from the land and well, and to bring the funds derived therefrom into court. This order was complied with by the receiver and after paying all expenses authorized by the court, court costs, etc., the balance

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

in the hands of the receiver was \$94.80, which money was paid pro rata to the several lien holders. After exhausting said assets there was still due appellants the sum of \$76.75, and to appellee, the Western Supply and Drilling Co., \$147.10, and to appellee, the Independent Torpedo Company, \$138.65. The court entered a personal decree against appellee, Freshwater, for the several amounts above set forth owing to appellants, and the said Western Supply and Drilling Co., and the Independent Torpedo Co., but refused to enter any personal decree against appellants, Schuder, Chandler and the Lawrenceville Salvage Company. From the decrees so entered by the court refusing to hold personally liable appellees, Schuder, Chandler and the Lawrenceville Salvage Co. for said above amounts found to be still owing to appellants, the Western Supply and Drilling Co., and the Independent Torpedo Company, appellants prosecuted this appeal.

The errors assigned in this case raise only one question, and that is whether or not Schuder, Chandler and the Lawrenceville Salvage Co. are personally liable on the contracts made by appellee Freshwater with appellants for the drilling of the well in question and with the Western Supply Co., for supplies furnished for said well, and the contract made with the Independent Torpedo Co., for shooting the same.

We have carefully examined the record in this case and are of the opinion that from the evidence in the record the trial court properly decided this case, and that the record discloses no foundation for a personal decree against

appellees, Barnes, Schuler and the Lawrenceville Salvage Co., for the contracts made by Freshwater for drilling, supplies, etc. Appellants placed appellees, Freshwater on the stand, who testified that under the contracts made by him with appellees, Barnes, Schuler and the Lawrenceville Salvage Co., for a one-fourth interest respectively in the well to be constructed by him that he, Freshwater, was to construct said well at his own expense and without any liability incurred on the part of Barnes, Schuler and the Lawrenceville Salvage Co., in other words, he testified that they were only to purchase an interest in said well when completed, and that they had nothing whatever to do with the construction of the well or the bills incident thereto. There is no evidence either oral or written in the record tending or tending to prove that appellees, Barnes, Schuler and the Lawrenceville Salvage Co., had anything to do with the making of the contracts for the boring of the well, the furnishing of supplies, or the erecting of said well. These contracts were all made with Freshwater exclusively. In fact, the witnesses who testified on behalf of appellants, testified that they had no conversation or dealing with Barnes, Schuler or the Lawrenceville Salvage Co., prior to the 11th day of April, 1914, the date of the making of the assignment by Freshwater to Barnes, Schuler and the Lawrenceville Salvage Company for their respective interest in said well, and that at that time the well was completed and was in operation. There is some evidence in the record that was heard by the court subject to objection to the effect that appellee, Freshwater, stated to appellants that there were

other persons interested with him in the well in question, but the interests of said parties were not disclosed by Freshwater, neither were their names disclosed by him. The law is that the declarations of the alleged agent alone is not sufficient to prove agency. *Merchants' Nat. Bank v. Nichols*, 223 Ill. 41; *Callanphy Savings Bank v. Scott*, 135 Ill. 655; *Nichols v. Fred Miller Brewing Co.*, 100 Ill. 645.

In *Merchants' Nat. Bank v. Nichols & Co.*, *supra*, at page 49, the court says: "An agent cannot confer power upon himself, and therefore his agency or authority cannot be established by showing what he said. (*Proctor v. Tate*, 115 Ill. 138; *Callanphy Savings Bank v. Scott*, 135 Ill. 655)." The law further is that before appellant could be entitled to hold appellees, Barnes, Schuder and the Lawrenceville Salvage Co., personally on a contract made by Freshwater they must prove either by positive evidence that Freshwater was an agent for Barnes, Schuder and the Lawrenceville Salvage Co. to do the acts alleged, and to incur the liability sought to be enforced against said parties, or they must prove facts and circumstances surrounding the transaction which would go to prove that appellees, Barnes, Schuder and the Lawrenceville Salvage Co. had held Freshwater out as their agent in connection with the matters and things involved in the drilling of said well and in the subsequent of the explosion incident thereto. *Merchants' Nat. Bank v. Nichols*, *supra*, *Alton Land Co. v. Biblical Institute*, 243 Ill. 338.

The record in this case is barren of any evidence

[illegible]

proving or tending to prove that Appellants, Barnes, Remder and the Lawrenceville Salvage Co. had procured but no
their spent for the construction of said well, nor does it
furnish facts and circumstances tending to prove such
agency.

Without proof of this character, there could be
no recovery in this case against said Appellants personally.
The trial court allowed the claims of Appellants so far as
the property connected with the lease and said the well in
question was involved and this is as far as we think the
court was warranted in going on the record in this case.

Finding no reversible error in the record the
judgment of the trial court was affirmed.

Affirmed.

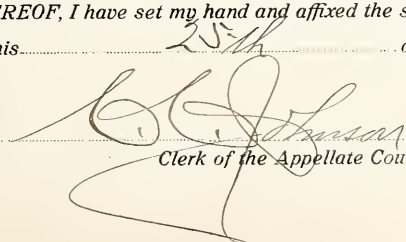
Not to be published in 1911.

proving it feasible to have the...
and the...
their...
...
...
...

1. The first of these is the fact that the majority of the population of the country is of Indian descent, and that the Indian population is increasing rapidly. This is due to the fact that the Indian population is increasing rapidly, and that the Indian population is increasing rapidly.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 25th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....

2375

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

203 I.A. 88

Morris Sternberger, doing business
as Empire Furniture Co.,
Appellee

ERROR TO
APPEAL FROM

vs.

No. 75
March Term, 1916.

City COURT

Anheuser-Busch Brewing Association,
Appellant

East St. Louis COUNTY

TRIAL JUDGE

HON.

H. T. VANLINTNER

Robert H. Flammiger

Term No. 75.

In the Appellate Court
of Illinois, Fourth District.
March Term, 1918.

Volume 45.45

Joseph Sternberger, doing busi-
ness as Empire Furniture Co.,

Appellee

vs.

Anheuser-Busch Brewing Association,
a Corporation, Appellant

County of Cook, City
of Chicago, Illinois,
1918/1919.

Opinion by Logan, J.

Suit was instituted in the City Court of Cook
County, Illinois, by Joseph Sternberger, doing business as the
Empire Furniture Co., against defendant Anheuser-Busch Brewing
Association for certain saloon furnishings that defendant claims to have
sold to appellant. The declaration contained in the com-
mon counts in which plaintiff alleged that defendant issued a
check on the first of March 1917, for the sum of \$100.00, and
that the said check was cashed by plaintiff in favor
of defendant, from which plaintiff received the sum of \$100.00.

The evidence disclosed that on or about the 27th
day of March 1917, plaintiff sold to defendant, Anheuser-
Busch Brewing Association, certain saloon furnishings, to-wit,
stools, in all to the value of \$100.00, and that defendant
thereupon issued for payment to plaintiff a check for the sum of
\$100.00, and the same was cashed by plaintiff in favor of
defendant. Thereafter on or about the 1st day of June 1917
plaintiff became financially involved. A number of certain

Year 1901
 to the Registrar
 of Illinois, State
 of Illinois, 1901

The undersigned, being duly
 sworn, depose and say that
 the within and foregoing
 is a true and correct
 copy of the original
 of the same, as the same
 appears from the files
 of the Department of
 the Interior, at
 Washington, D.C.

Witness my hand and seal this 1st day of May, 1901.

All the foregoing is the true and correct
 copy of the original of the same, as the same
 appears from the files of the Department of
 the Interior, at Washington, D.C.
 and the undersigned, being duly sworn, depose
 and say that the within and foregoing is a true
 and correct copy of the original of the same,
 as the same appears from the files of the
 Department of the Interior, at Washington, D.C.

The undersigned, being duly sworn, depose
 and say that the within and foregoing is a true
 and correct copy of the original of the same,
 as the same appears from the files of the
 Department of the Interior, at Washington, D.C.
 and the undersigned, being duly sworn, depose
 and say that the within and foregoing is a true
 and correct copy of the original of the same,
 as the same appears from the files of the
 Department of the Interior, at Washington, D.C.

of his creditors was held which resulted in the making of a bill of sale of his property, consisting of his saloon stock and fixtures to George E. Conradtetter, manager for appellee, at East St. Louis. This bill of sale did not include the above mentioned furniture covered by appellee's mortgage. Appellee attended the meeting of said creditors but took no part therein.

The evidence further discloses that appellee loaned appellee \$140.00 for the purchase price of said property leaving a balance owing of \$140.00. It is the contention of appellee that appellant through its manager, George Conradtetter contracted with appellee to pay said balance of \$140.00 for said furniture. On the other hand appellee testifies it made no agreement whatever through Conradtetter or anyone else to purchase said furniture or to pay to appellee said balance. On the trial in said cause a verdict and judgment resulted in favor of appellee and judgment was rendered against appellant accordingly.

It is contended by appellant that the verdict is against the manifest weight of the evidence. First, because it is insisted that Conradtetter, manager for appellee in its branch office at East St. Louis, was authorized or directed to purchase said furniture for and from appellee, and second, that even though the evidence does disclose that Conradtetter did purchase said furniture on claim of appellee, that, he, Conradtetter, was not acting within the scope of his authority as such agent of appellee. On the question of whether Conradtetter was in agreement with

of the Commission and this report is the basis of
a bill of the Commission, containing a full
and complete statement of the facts and
the results of the investigation. It is the
policy of the Commission to make its reports
as complete and as full as possible, and to
include in them all the facts and details
which are necessary to a full understanding
of the case. The Commission is not a
court, and it is not its duty to make
recommendations. It is its duty to
report the facts and the results of its
investigation, and to leave it to the
legislature to make such recommendations
as it may see fit. The Commission is
not a part of the executive branch of
the government, and it is not subject to
the control of the President. It is an
independent body, and it is responsible
to the people. The Commission is not a
part of the judicial branch of the
government, and it is not subject to
the control of the Supreme Court. It is
an independent body, and it is responsible
to the people. The Commission is not a
part of the legislative branch of the
government, and it is not subject to
the control of the Congress. It is an
independent body, and it is responsible
to the people. The Commission is not a
part of the executive branch of the
government, and it is not subject to
the control of the President. It is an
independent body, and it is responsible
to the people. The Commission is not a
part of the judicial branch of the
government, and it is not subject to
the control of the Supreme Court. It is
an independent body, and it is responsible
to the people. The Commission is not a
part of the legislative branch of the
government, and it is not subject to
the control of the Congress. It is an
independent body, and it is responsible
to the people.

appellee for the purchase of said furnishings, the evidence is to the effect that Schraubstadter inquired of him how much there was owing to him from Luckley, and what he would take to adjust his claim; that he stated he would settle his claim for \$146.67, the balance that was owing to him. Appellee further testified that he called on Schraubstadter on two or three occasions with reference to paying the balance owing on said goods and taking the same, and that finally Schraubstadter came to the store of appellee and while there agreed to pay appellee \$146.00 in settlement of the balance owing on said goods; that Schraubstadter agreed to send him a check for \$137.00 when he went back to his office and stated that appellant, the Lancaster-Busch Co., would mail a check to appellee for the balance on Monday of the following week. This transaction took place on Friday, June 28. Appellee further testified that he inquired of Schraubstadter if he had authority to settle for said property on behalf of appellant and that Schraubstadter stated that he had; that he was the manager or agent for appellant in East St. Louis, and as such had authority to make the settlement. Appellee further testified that Schraubstadter failed to mail the check as he agreed to mail and that appellant failed to make payment to him for the amount owing on said settlement and that he brought this suit to enforce payment of said debt.

Appellee is corroborated in his testimony by Elise Beck, his bookkeeper and by a man by the name of J. J. Jensen, who worked for appellee at his store. Both of

The following is a list of the names of the persons who have been identified as being involved in the activities of the Central Intelligence Agency (CIA) in the United States, as reported by the House Select Committee on Assassinations in its report, "The CIA and the Kennedy Assassination," dated May 1975.

The names are listed in alphabetical order, and are followed by the page number of the report in which they appear.

The names are:

1. [Name] (Page 1)

2. [Name] (Page 2)

3. [Name] (Page 3)

4. [Name] (Page 4)

5. [Name] (Page 5)

6. [Name] (Page 6)

7. [Name] (Page 7)

8. [Name] (Page 8)

9. [Name] (Page 9)

10. [Name] (Page 10)

11. [Name] (Page 11)

12. [Name] (Page 12)

13. [Name] (Page 13)

14. [Name] (Page 14)

15. [Name] (Page 15)

16. [Name] (Page 16)

17. [Name] (Page 17)

18. [Name] (Page 18)

19. [Name] (Page 19)

20. [Name] (Page 20)

21. [Name] (Page 21)

22. [Name] (Page 22)

23. [Name] (Page 23)

24. [Name] (Page 24)

25. [Name] (Page 25)

26. [Name] (Page 26)

27. [Name] (Page 27)

28. [Name] (Page 28)

29. [Name] (Page 29)

30. [Name] (Page 30)

31. [Name] (Page 31)

32. [Name] (Page 32)

33. [Name] (Page 33)

34. [Name] (Page 34)

35. [Name] (Page 35)

36. [Name] (Page 36)

37. [Name] (Page 37)

38. [Name] (Page 38)

39. [Name] (Page 39)

40. [Name] (Page 40)

41. [Name] (Page 41)

42. [Name] (Page 42)

43. [Name] (Page 43)

44. [Name] (Page 44)

45. [Name] (Page 45)

46. [Name] (Page 46)

47. [Name] (Page 47)

48. [Name] (Page 48)

49. [Name] (Page 49)

50. [Name] (Page 50)

51. [Name] (Page 51)

52. [Name] (Page 52)

53. [Name] (Page 53)

54. [Name] (Page 54)

55. [Name] (Page 55)

56. [Name] (Page 56)

57. [Name] (Page 57)

58. [Name] (Page 58)

59. [Name] (Page 59)

60. [Name] (Page 60)

61. [Name] (Page 61)

62. [Name] (Page 62)

63. [Name] (Page 63)

64. [Name] (Page 64)

65. [Name] (Page 65)

66. [Name] (Page 66)

67. [Name] (Page 67)

68. [Name] (Page 68)

69. [Name] (Page 69)

70. [Name] (Page 70)

71. [Name] (Page 71)

72. [Name] (Page 72)

73. [Name] (Page 73)

74. [Name] (Page 74)

75. [Name] (Page 75)

76. [Name] (Page 76)

77. [Name] (Page 77)

78. [Name] (Page 78)

79. [Name] (Page 79)

80. [Name] (Page 80)

81. [Name] (Page 81)

82. [Name] (Page 82)

83. [Name] (Page 83)

84. [Name] (Page 84)

85. [Name] (Page 85)

86. [Name] (Page 86)

87. [Name] (Page 87)

88. [Name] (Page 88)

89. [Name] (Page 89)

90. [Name] (Page 90)

91. [Name] (Page 91)

92. [Name] (Page 92)

93. [Name] (Page 93)

94. [Name] (Page 94)

95. [Name] (Page 95)

96. [Name] (Page 96)

97. [Name] (Page 97)

98. [Name] (Page 98)

99. [Name] (Page 99)

100. [Name] (Page 100)

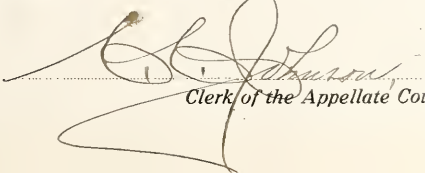
[illegible]

The Commission on the Status of Women, established in 1946, was the first international body to deal with the status of women. It was created by the Economic and Social Council of the United Nations. The Commission's mandate was to study the status of women in all countries and to make recommendations to the United Nations on ways to improve it. The Commission has since held several sessions and has produced a number of reports and recommendations. One of its most important achievements was the adoption of the Declaration on the Elimination of Discrimination against Women in 1965. This declaration was the first international instrument to define discrimination against women and to set out a framework for the elimination of such discrimination. The Commission has also been instrumental in the development of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979. CEDAW is the only international treaty that deals specifically with the rights of women. It has been ratified by over 100 countries and is considered one of the most important instruments in the field of women's rights.

The Commission has also been instrumental in the development of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979. CEDAW is the only international treaty that deals specifically with the rights of women. It has been ratified by over 100 countries and is considered one of the most important instruments in the field of women's rights. The Commission has also been instrumental in the development of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979. CEDAW is the only international treaty that deals specifically with the rights of women. It has been ratified by over 100 countries and is considered one of the most important instruments in the field of women's rights. The Commission has also been instrumental in the development of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979. CEDAW is the only international treaty that deals specifically with the rights of women. It has been ratified by over 100 countries and is considered one of the most important instruments in the field of women's rights.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 23rd day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

.....

2379

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 87

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

and later on January 13, 1917, Opinion was modified and order refiled.

Dora M. Riggin,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

No. 83

County COURT

March Term, 1916.

Madison COUNTY

Martin Keck,

Appellant

TRIAL JUDGE

HON. H. B. EATON

Term No. 83. In the Appellate Court of Illinois, Fourth District.
March Term, A. D. 1918.

John A. Higin, Appellee)
vs.) Appeal from County Court
Martin Beck, Appellant) of Madison County, Illinois.

Opinion by Rogers, J.

Proceedings were had in the County Court of Madison County for the trial of the rights of property under the statute wherein John A. Higin, appellee, was claimant and Martin Beck, appellant, was plaintiff on attachment. Trial was had resulting in a verdict and judgment in favor of appellee, from which judgment appellant prosecutes this appeal.

The principal grounds relied on for reversal of this cause are that the court erred in its ruling on the evidence; that the verdict is against the preponderant weight of the evidence, and that the court erred in its ruling on the instructions. Other errors were assigned but were not urged by appellant in the brief and hence are waived as this court are taken or waived.

The evidence discloses that on or about the 15th day of July A. D. 1917, Clifford J. Rogers, manager of the hotel and three other parties who with him were engaged in a gaming enterprise at Troy, Illinois, borrowed from appellee

Term No. 63. In the Senate of the State of Illinois, January 1, 1891.

Report of the Committee on the Administration of the State, for the year 1890.

Approved by the Senate, January 1, 1891.

The following report was made by the Committee on the Administration of the State, for the year 1890, to the Senate of the State of Illinois, January 1, 1891.

The Committee on the Administration of the State, for the year 1890, has the honor to report to the Senate of the State of Illinois, January 1, 1891, the following results of its labors.

The Committee on the Administration of the State, for the year 1890, has the honor to report to the Senate of the State of Illinois, January 1, 1891, the following results of its labors.

\$100.00 and gave their promissory note for said amount due one year after date, with interest at 6%. Said parties failed to pay said note when due, and appellant instituted suit at the January Term, 1914, of the Madison County Circuit Court against the makers of said note, and thereupon a writ of attachment in aid against the property of said Alfred L. Higgin, husband of appellee.

The evidence further discloses that on or about the 10th day of August 1914, Alfred L. Higgin, executed a bill of sale purporting to convey to appellee, his wife, in consideration of \$125.00 certain horses, cows, dogs, farming implements, grain, etc., which said bill of sale was acknowledged before a Justice of the Peace in said county and was recorded in the recorder's office of said county on the 10th day of August 1914. The attachment in aid above referred to against the said Alfred L. Higgin was levied on the above described property. Notice was given by appellee to the Sheriff in said county as provided by statute, and a hearing was had in the County Court on a trial of the rights of property, resulting as above set forth.

The evidence discloses that the Justice of the Peace who took the acknowledgment to said bill of sale for Alfred L. Higgin to appellee, his wife, omitted the words in the certificate of acknowledgment, "and entered upon" and the question raised is whether or not the omission of said words from said certificate renders the bill of sale void as to third parties. While this objection was specially made to the bill of sale on the trial of said cause as disclosed by the record, the objection is not urged in

1100. The fact that the defendant was not the owner of the property at the time of the sale, and that the sale was made by a person who was not the owner of the property, is a fact which is not in dispute.

1110. The fact that the defendant was not the owner of the property at the time of the sale, and that the sale was made by a person who was not the owner of the property, is a fact which is not in dispute.

1120. The fact that the defendant was not the owner of the property at the time of the sale, and that the sale was made by a person who was not the owner of the property, is a fact which is not in dispute.

1130. The fact that the defendant was not the owner of the property at the time of the sale, and that the sale was made by a person who was not the owner of the property, is a fact which is not in dispute.

1140. The fact that the defendant was not the owner of the property at the time of the sale, and that the sale was made by a person who was not the owner of the property, is a fact which is not in dispute.

the brief and argument of appellant. Without going into an extensive discussion on the question raised by this objection, we will say that under the holding of the Supreme and Appellate Courts of this state, we do not think this objection is well taken. In *Goodwin v. Hodge*, 20 Ill. 41, and *Harvey v. Kane*, 29 Ill. 185, it was held that the failure of the Justice of the Peace taking an acknowledgment of a chattel mortgage to insert the words "and delivered by me" in his acknowledgment does not constitute a substantial objection. It was also held in both of said cases that it was sufficient if the Justice made the entry in his docket as required by statute. And in *Goodwin v. Hodge*, 20 Ill. 41, 42; *Harvey v. Kane*, 29 Ill. 185, 186; and *Harvey v. Kane*, 29 Ill. 185, 186, it was held that in the absence of proof to the contrary it is presumed that a public officer who has taken an acknowledgment of a chattel mortgage has done his duty and has made the endorsement required by law in his docket or book kept for that purpose.

It was further held in *Goodwin v. Hodge*, supra, *Harvey v. Kane*, supra, and *Harvey v. Kane*, supra, that, "even though the officer who has taken the acknowledgment of the chattel mortgage or bill of sale fails to make the endorsement required by statute in his docket or book kept for that purpose, the rights of the mortgagee or purchaser, who had no control over the officer, could not be prejudiced by such failure."

We therefore hold in favor of the appellant in the above cases that the objection to the bill of sale is not well taken and there was no error in the court's decision in these

[illegible]

in evidence as there is nothing in the record showing or tending to show but what a proper entry was made on the justice's docket of said bill of sale as provided by statute. The presumption being that a proper entry was made.

It is next contended by appellant that the verdict of the jury in this case was against the weight of the evidence. It is contended on the part of appellant that the bill of sale made by Alfred L. Higgins to appellee, his wife, was without consideration and a fraud upon the right of appellant as creditor of Higgins, and appellant contends that at the time said bill of sale was executed purporting to transfer the title of the property in question to her from her husband, her husband was indebted to her for at least \$125.00, the amount named in said bill of sale.

The question is not raised by appellant that the property in question is worth in excess of \$125.00 and no question of that character is in the record. The only question is as to whether the indebtedness claimed by appellant to be owing from her husband at the time said bill of sale was made was a bona fide indebtedness. The evidence on this controverted question is more or less conflicting. The testimony on the part of appellant and his witnesses is to the effect that appellee owned no property whatever at the time her husband engaged in said union connection, and that the property attached which is the same property covered by the bill of sale, never passed from said husband to appellant and that he continued to exercise full and complete control over the same; that he used it in farming, certain articles which

had been leased to him several years previous to the trial of this cause, and that appellee never exercised any rights of ownership over said property after the making of said bill of sale. The evidence on the part of appellant further tended to show that the bill of sale in question included practically all of the property owned by him at the time the same was executed. On the other hand appellee's testimony is to the effect that her father had given her a cow at the time of her marriage and that from the increase from this cow and from keeping chickens, raising chickens, selling eggs, butter, etc., she had purchased other cows and had accumulated certain funds which she from time to time loaned her husband beginning in 1911 when her husband went into the mining business, resulting in the aggregate to at least \$70,000. The evidence on the part of appellee further tends to show that appellee purchased certain real estate at the estate in voluntary sale which real estate she mortgaged for \$20,000, the proceeds of which mortgage she used in paying on a certain debt indebtedness of her husband, taking in all the \$20,000 which she claims was owing to her at the time said bill of sale was executed. If, as a matter of fact, appellant was indebted to appellee at the time of the execution of said bill of sale, if said bill of sale was made upon a sufficient consideration and if the same was a fair transaction, then the same would be valid and binding, notwithstanding the fact at the time may have been indebted to third parties. *Boyd v. Miller* 103 Ill. 442; *Patrick v. Patrick*, 77 Ill. 355; *Overholt*

[illegible]

/// It is also contended by appellant that inasmuch as the growing wheat in controversy was not covered by the bill of sale in question that therefore no right thereto is shown by appellee. The evidence, however, tends to show that appellee at the time said wheat was sown was farming the premises occupied by her and her husband and that the growing wheat thereon belonged to her. At any rate the evidence on said controverted question was conflicting and we are not able to say that the finding of the jury on said issue was against the manifest weight of the evidence.

(Modification made by the Court, January 13th, A. D. 1917)

#

It is also contended by appellant that inasmuch

as the growing wheat in controversy was not covered by the bill of sale in question that therefore no right thereto is shown by appellee. The evidence, however, tends to show that appellee at the time said wheat was sown was farming the premises occupied by her and her husband and that the growing wheat thereon belonged to her. At any rate the evidence on said controverted question was conflicting and we are not able to say that the finding of the jury on said issue was against the manifest weight of the evidence.

(Modification made by the Court, January 13th, A. D. 1917)

v. Hawks, 56 Ill.71; Hamilton, v. Matthews, 3 Ill.170; Cartwright v. Cartwright, 38 Ill.App.74; Ch. v. Lyden, 134 Ill.App.351; The German Insurance Co. v. Bartlett, 188 Ill.155.

In *Lyden v. Lyden*, supra, the court in discussing this question at page 445 says: "With respect to the right of a husband to make a conveyance to his wife, even in failing circumstances, the law is well settled as to when made upon a full, fair consideration, and where such conveyances are made in good faith they will be sustained to the extent of the consideration actually paid, and no farther."

In *German Insurance Co. v. Bartlett*, supra, the court at page 174 says: "Frederic Bartlett had the right to prefer his wife to his other creditors, provided the preference was based upon a valuable consideration and was made in good faith."

It was a question of fact for the jury to determine from the evidence whether or not appellee's husband was indebted to her at the time he executed said will, which was testified by appellee, and as to whether said will was made in good faith and not in fraud of the rights of creditors. By their verdict they have found in favor of appellee on that issue, and we are unable to say from the evidence that the finding of the jury is against its manifest weight and unless we can do so the verdict should not be disturbed on that ground.

fiction # Lastly, it is contended by appellee that the court erred in its rulings on the instructions. A large number of

instructions were given on behalf of both parties to this proceeding, and an examination of the instructions discloses that no serious errors were committed by the court in its rulings on the same. Eleven instructions were given on behalf of appellant. Nine were given as submitted by appellant, and two were modified and then given, and we think that the court liberally instructed the jury on all phases of appellant's case. Only one instruction offered by appellant was refused by the court. While there is no serious objection to the principle announced by this refused instruction it was abstract in form, and its refusal was discretionary with the trial court. *Devlin v. The People*, 104 Ill. 504; *A.T. & M.T. & N. Co. v. Leckman*, 149 Ill. 200.

In *Devlin v. The People*, supra, the court in discussing an instruction of this character at page 507 says: "With respect to the tenth instruction, it will be noticed it contains, at most, mere abstract principles of law, more or less accurately stated, and, as this court has often said, it was not error to refuse such an instruction."

It might be further observed with reference to this instruction that it was long and involved and its tendency would be to confuse rather than enlighten the jury on the issues involved. One of the principal objections to certain of the instructions given on behalf of appellant was that said instructions failed to require the jury to find from a preponderance of the evidence. However, that requirement is contained in a large number of the instructions, and it is not necessary that every instruction shall contain this statement. The instructions are to be taken as a whole and

[illegible]

and so taken the jury could not have been misled on account of the failure of certain of the instructions to contain said requirement.

The most serious objection urged to the instructions given on behalf of appellee as the objection made to the first specified instruction is, namely, "This instruction tends to assume as a fact that appellee was operating the farm which was and has become used carrying on tenants. This instruction does not direct a verdict and taken in connection with the other instructions given on behalf of appellant, we do not believe we ought to be serious and should not warrant a reversal of the cause. It might be further observed with reference to this instruction that the fact assumed is not one of the material facts in the case, but only comes incidentally. The other objections made to the instructions were not of a serious character, and it is not necessary to comment on the same. When we consider we think the instructions were so favorable to appellant's theory of the case as the law would warrant.

Nothing so revealing to error in the record, the judgment of the trial court will be affirmed.


Judgment affirmed.

Not to be reported in full.

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 25th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....

2381

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 97

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

LaSalle Extension University,
Plaintiff in Error.

vs.

No. 7
March Term, 1916.

John H. Stelle,
Defendant in Error.

ERROR TO
~~APPEAL FROM~~

County COURT

Hamilton COUNTY

TRIAL JUDGE

HON. JOSHUA S. SNEED

Term 10. 7.

In the Appellate Court,

Fourth District.

March Term A. D. 1916.

Traylor Extension University,)
Plaintiff in error.)

vs.

John H. Stille,

Defendant in error.)

) Writ of error to the
) County Court of Adams-
) son County.

McClure, J.

It appears from the record that the defendant in error obtained a judgment against the plaintiff in error in the court below for costs of suit, to which said writ of error is prosecuted.

It further appears from the record and files herein that the defendant in error has failed to file a brief in this case as required by the rules of this Court. It is therefore ordered that the judgment of the lower court be reversed pro forma, as provided by the rules under rule 27 of this Court.

The judgment of the lower court is reversed and the cause remanded.

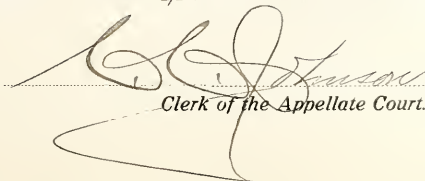
Reversed and remanded.

Not to be reported in full.

... 211 ...

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 20th day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....

2384

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 117

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

H. H. King,

Appellee.

~~ERROR TO~~
APPEAL FROM

vs.

No. 12.

Circuit COURT

March Term, 1916.

Pulaski COUNTY

D. W. Heilig, et al,

Appellants.

TRIAL JUDGE

HON. B. W. POPE

Term No. 12.

In the Appellate Court.

Volume 115

Fourth District.

March Term, 1916.

A. H. King,
Appellee.

vs.

D. W. Neillig, et al,
Appellant.

}
}
}
}
}

Appeal from the Circuit Court
of Pulaski County.

Opinion, P.

The appellee recovered a judgment against appellant for \$1055.08, to reverse which this is brought.

It appears from the record in this case that D. W. Neillig and A. H. King gave their joint and several promissory note for the amount of \$750.00, which note was assigned to appellee by attorney authorizing any attorney in 1908 (also 1909 & 1910) to confess judgment on such note in favor of the assignee for the amount unpaid and an attorney's fee of ten per cent.

A few days after this note was made A. H. King received and delivered it to appellee as collateral security.

July 22nd, 1913, appellee procured a judgment against the makers of said note *in vacation for \$45.04 and costs. The makers of said note* made application to set aside the confession of judgment and for leave to plead. The court ruled the motion to set aside the judgment was denied the defendants to plead and allowed the judgment on appeal as security. The defendants filed a bill of review and also

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

TO THE HONORABLE CHAIRMAN OF THE BOARD OF TRUSTEES
OF THE UNIVERSITY OF CHICAGO
FROM
J. H. HARRIS, JR.
PROFESSOR OF CHEMISTRY

Respectfully,

It is with a deep sense of regret that I am compelled to inform you that I am unable to accept the position of Professor of Chemistry which has been offered me. I have been unable to do so because of the pressing demands upon my time and energy by my present position as Professor of Chemistry at the University of Chicago. I have been unable to do so because of the pressing demands upon my time and energy by my present position as Professor of Chemistry at the University of Chicago. I have been unable to do so because of the pressing demands upon my time and energy by my present position as Professor of Chemistry at the University of Chicago.

Handwritten note: The number of students

the plea of general issue, with notice to produce evidence relied on for defense, which notice states that the appellee held said note as collateral security for a debt then owing by the said Barrin to the appellee and that on January 1, 1907, Barrin placed with appellee as a substitute for the note in question another note against one King for the amount of one thousand dollars, which was accepted by appellee as collateral security in lieu and as a substitute for the note sued upon. Also averring that a few days before the note sued upon became due that the defendant King paid the note to W. C. Barrin and fully satisfied the same, but the note remained in the hands of King and was not surrendered to Barrin at the time that he claimed to have made the payment. It appears from the testimony offered by defendant upon the trial of this case that Barrin was engaged in the banking business and that he procured the appellee first to become a customer and depositor in his bank and that he gave the note here sued upon as collateral security to indemnify King against any loss that he might sustain by reason of the failing of the deposit in Barrin's bank. That Barrin was not in the banking business and had said King as depositor in said bank and that he was not in any manner indebted to King upon his bank account; that the note in question was not held by appellee as security for any indebtedness of the said Barrin. The testimony of appellee tended to show that the note was procured and delivered by Barrin to appellee as collateral security upon several different notes that were in fact received from Barrin, some of which were secured by Barrin and others endorsed by him to appellee and that the notes

for which the note in question was held as collateral security had not been paid. It also appears from the testimony of appellee's witnesses that Barrin from time to time withdrew some of these notes and placed others in their stead. The cause was tried by a jury and resulted in a verdict for the appellee for \$155.00; upon which verdict the court rendered judgment against the appellant. *U. S. v. Barrin*.

It appears from the record in this case that the defense set up in the special notice by the appellant, that the appellee accepted a note executed by J. J. Davis as Barrin for one thousand dollars as collateral security for his indebtedness and that the Davis note was substituted as such security for the note in question, was abandoned and the claim made upon the trial, upon which evidence was introduced by appellant, was to the effect that appellee held the note in question as collateral security to indemnify him against any loss that he might sustain by reason of not having made deposits in Barrin's bank. It was denied by appellee that he accepted the note as security to indemnify him for any deposits made in Barrin's bank and claimed that he received it as collateral security for several notes that he had obtained from Barrin. The evidence upon these propositions was quite conflicting. Barrin and one person who was in the bank, testified to the claim as made by appellant, and a man by the name of Stewart also stated that appellee admitted to him that he held the note as security for his bank account. This was denied by appellee and he also denied having made any such statement to Stewart.

The House has not in session for some time, and the
 Senate has not yet convened. It is not known whether the
 House will convene on the 1st of January, or whether it
 will be postponed until the 15th. The Senate has not yet
 decided whether it will convene on the 1st of January, or
 whether it will be postponed until the 15th. The House
 has not yet decided whether it will convene on the 1st of
 January, or whether it will be postponed until the 15th.

The House has not in session for some time, and the
 Senate has not yet convened. It is not known whether the
 House will convene on the 1st of January, or whether it
 will be postponed until the 15th. The Senate has not yet
 decided whether it will convene on the 1st of January, or
 whether it will be postponed until the 15th. The House
 has not yet decided whether it will convene on the 1st of
 January, or whether it will be postponed until the 15th.

told him he sold it for the indebtedness owing by Larrin to him. J. M. Davis testified, on behalf of appellee, and denied that the one thousand dollar note was given as collateral security but stated it was for money loaned by appellee to Davis, through Larrin, and that he sold the loan to appellee and received the note. Appellee also offered in evidence the affidavit made by appellant Davis, stating that appellee held the note in question as collateral security for indebtedness of J. M. Larrin to appellant in the amount of ten thousand dollars, and that Larrin had paid the full amount of such indebtedness and discovered the said note as collateral security; and the other facts set forth were also offered in evidence by appellee.

We do not deem it necessary to go further into the details of the testimony introduced upon the trial of this case but suffice it to say that the testimony was quite conflicting, and that the evidence offered by appellee was sufficient to warrant a verdict in his favor, if the jury believed the state facts to be true, then we can see no reason why the finding of the jury should be disturbed as it cannot be said that it was manifestly against the weight of the evidence. If the appellee obtained this note from Larrin before it became due, and as collateral security for his indebtedness, then any payment made by appellant Davis to Larrin could not go in discharge of the note in the hands of appellee. It was the duty of appellant to see that the moneys paid by him upon this note were retained by the holder thereof.

It is also contended by appellant that appellant is

an ellipsis in the opening statement said to the jury, "Now you have heard the evidence in this case gentlemen, I am sure that you can arrive at only one verdict and that will be the same as the verdict given in this case by a competent jury", and that this was prejudicial error. This statement was improper and should not have been made but no objection was presented thereto and therefore the question need not be considered by this court.

It is also insisted that the court erred in admitting in evidence the affidavits and pleadings made by appellant which were offered by the appellee. We are unable to see how this could be error as they were just statements and declarations made by appellants and if inconsistent with the evidence offered upon the trial the jury were entitled to hear them and consider them with the other testimony.

Objection is made to plaintiff's instruction No. 2, that it did not describe what is meant by the term "bona fide holder". Objection is made to instruction No. 3, that it does not set out that King was a holder for value without maturity. We do not believe that these criticisms are well taken. While it may have been well to explain to the jury what a bona fide holder meant yet we think such terms are so commonly used that the jury could not be misled by it. The criticism upon instruction No. 3 is not well taken as the issue made by the special plea was that the defendant, which the note was held as security had been secured by the substitution of another note therefor and the evidence offered by appellant was that it was held as security for a bank debt and we do not believe that either

of the issues made by the evidence or the pleadings was that the note was held as security for the payment of an indebtedness after its maturity, but if an agreement was made as contended, that the note should be held not only for the indebtedness existing but for advancements to be made, we can see no reason why it should not be held to cover such advancements.

The criticisms made upon the foregoing instructions are not well taken, except as to the criticism made upon instructions nos. 3 and 5, that an attorney's fee of ten per cent should be allowed. We think this was error as the court had no right to allow attorneys fees as the note did not provide for attorney fees except upon the contingency of the confession of judgment. A judgment had been taken upon this note against these appellants for the full amount of the note, also attorney fees and that judgment remains on record and has not in any manner been set aside, so that if another judgment is rendered in favor of the appellee and against the appellants, or either of them, there would be two judgments for the same indebtedness. We think that the judgment rendered in this case was infernal and that the assessment of damages contained in the verdict was erroneous and should have been disregarded by the court in the entry of the judgment. The effect of the judgment as entered is to give the appellee a greater amount than he is entitled to recover. That part of the verdict of the jury at issue, "That the jury find the issues for the plaintiffs", is all that was necessary for the court to repeat in the entering up of his judgment and the judgment entered by confession

should have affirmed the judgment rendered on July 22, 1913 in favor of plaintiff and against the defendants and that execution issue thereon. Lyden vs. Lin, 192 Ill. 497; Northeastern Coal Co. vs. Tyrrell, 133 Ill., 470. We think this doctrine is sustained by the Supreme Court in the decision of Hall et al vs. First National Bank of Chicago, 133 Ill., 234. We do not think that the error is fatal in either the verdict or judgment entered herein and justify this court in awarding a new trial, as such error can be corrected without affecting the merits of the cause or the rights of the appellants.

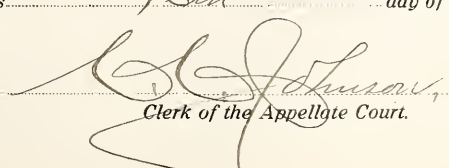
It is therefore ordered that the judgment of the Circuit Court of Pulaski County entered on July 1, 1911, in favor of appellee and against appellant, be reversed and the cause remanded to the said Circuit Court with instructions to vacate the judgment aforesaid and enter in its place instead a judgment in the following form, "Wherefore it is considered by the court that the judgment entered herein on July 22, 1911, in favor of the plaintiff and against the defendants for \$945.04, and costs, stand in full force and effect as of the time of its rendition."

Reversed and remanded with directions.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this.....16th.....day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....

2385

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 119

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

.....
.....
.....
.....
F. B. Nulsen,
.....
Defendant in error.....

ERROR TO
APPEAL FROM

vs.

No. 13.....

March Term, 1916.

City..... COURT

.....
.....
Terre Haute Brewing Co.,
.....
Plaintiff in error.....

East St. Louis..... COUNTY

TRIAL JUDGE

HON. W. M. VANDEVENTER.....

Term No. 13. In the Appellate Court, Agenda No. 59
Fourth District.
March Term 4. 1. 1916.

W. L. Hulsen,)	
Defendant in error.)	
vs.)	Error to the City Court of
Terre Haute Brewing Company,)	East St. Louis.
Plaintiff in error.)	

McGrife, J.

The defendant in error, hereinafter called defendant, recovered a judgment against the plaintiff in error, hereinafter called plaintiff, in the city court of East St. Louis, Illinois, for \$735.00, to reverse which this writ of error is prosecuted.

It appears from the record in this case that the defendant was the owner of a large building on Collinsville Ave., in the City of East St. Louis, one room of which is known as No. 312, Collinsville Avenue, and which room is a portion of said building, which contains many other rooms. The room No. 312 in controversy, was occupied as a saloon by a man by the name of Calvin who was entitled the same time the plaintiff. It appears some time during the year 1915, the defendant gave to Leo F. Scherer a lease in fee upon the building in question which contained six rooms. Under the lease made by defendant to Scherer defendant was

Form No. 10

of the National Board

of Fire Underwriters

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

San Francisco, California

to make the leases to the occupants of the several rooms but Scherer was to pay a lump sum each month as rent for the entire building and a certain additional sum each month for improvements. During the time that Scherer was lessee of the building the plaintiff obtained a lease from the defendant for which he agreed to pay a rental of \$65.00 per month. It further appears that during the latter portion of year 1911, Scherer failed to pay the rent as he had agreed to and on January 26, 1912, the defendant cancelled Scherer's lease but it was then agreed between them that Scherer should continue to collect the rents for defendant for which he was to have a commission of three per cent. Scherer continued to collect the rents until October 31, 1912, at which time defendant notified him that he had taken the collection of rentals out of his hands and had employed Sexton & Company to collect the rents upon the whole of the building in question. It further appears that on the 14th of October 1912, Scherer entered into a written agreement with the plaintiff renting the plaintiff the room known as No. 117 for the period of one year ending October 31, 1913, for a cash rental of \$350.00 and \$195.00 to be paid October 1st; and Scherer further agreed that on or before October 5th to give to plaintiff a lease on the above premises for a period of two years from said October 5th. This lease was drawn and signed by Scherer as lessee and in the copy of the same it purports to be made by Scherer as lessee of the property. Scherer did not report such leasing of the premises in question to the defendant and did not pay the advance rent to the defendant. Upon the witness stand he stated that he supposed that he was receiving this money as lessee.

There appears to have been some litigation between the defendant and Cherer with reference to possession of this property, the exact nature of which is not disclosed. It also appears that after the defendant had placed the collection of rents in the hands of Norton & Company that Norton called upon the manager of plaintiff to inform him he was renting this property and the manager handed him the lease that he had secured from Cherer in October 1918. The defendant demanded payment of rent from the plaintiff, which was refused and this suit was brought and judgment rendered as above stated.

The defendant, in his declaration, filed a special count and the common counts. In the special count he charges an agreement upon the part of the plaintiff to pay a rental of \$5.00 per month, and charges that he had failed to do so.

This case is argued and submitted upon two errors. 1st.-That the verdict is manifestly against the weight of the evidence. 2nd.-That there was error in the giving and refusing of instructions.

The theory of the plaintiff in his argument is that he leased the premises in question from Cherer as the agent of defendant, and that the money was actually paid to Cherer as such agent. It is conceded by plaintiff that defendant was the owner of the building located on Collinsville Ave., as above stated, and consisting of several rooms, including the room in question; that he gave a ninety-nine year lease to Cherer who was to pay a monthly rental for the building and improvements and that the re-

mainder belonged to Scherer. The leases were to be made by the defendant. It also appears that the defendant while Scherer was lessee of the building made a lease to the plaintiff for room No. 312, at a monthly rental of \$69.00, and that Scherer collected the rents and accounted to the defendant for several months for the rents according to the terms of his lease. It also appears that on one or more occasions the plaintiff advanced more rent to Scherer than was due under the terms of his letting out during this time Scherer paid to the defendant his rents in a lump sum according to the terms of his lease, but it is not shown that such advancements were known to the defendant. It also appears that Scherer became in arrears with his rent and after having been advised at different times that unless he paid up his rent his lease would be cancelled, that on the 26th of January 1912, Scherer's lease was cancelled by the defendant and at that time defendant employed Scherer to collect the rents upon the building for a commission of three per cent, which he continued to do until October 31, 1912, at which time the collection of rents was taken from the hand of Scherer and placed with Weston & Company to collect but on October 11, 1912, and before Weston came into charge of the rentals Scherer made the \$69.00, above described, to plaintiff to extend from October 11, 1912, to October 3, 1913, and the plaintiff thereupon paid to Scherer, together with moneys he had theretofore advanced, the amount of \$730.00 as rents. It also appears from the evidence that at the time of the making of the lease by

Scherer to plaintiff that Scherer told Peter Teib, the manager of defendant, "that he had a certain agreement with Nulsen but he did not say it had expired. He said he had some trouble in regard to it but that he would get us a lease from Nulsen. When I paid this rent to Leo J. Scherer I paid it to him with the understanding that he was to get me a lease for the property for one year from Nulsen. I requested Mr. Scherer to give us an agreement in this case as Scherer told me at the time that he was acting as the agent for Nulsen. He told me at the same time that he could not lease that property but that Nulsen was the only man that could lease it. He said he would get a lease from Nulsen for us. I paid Scherer as agent. We had no contract with Scherer. He had an agreement with him. He could get a lease for us from Nulsen. He did not say that he could get us a lease himself. He said at the time that under his contract with Nulsen, Nulsen had to make the lease. He had to go and get Nulsen's approval". The evidence is quite clear that Scherer in fact had no right to lease the room or to do anything with it but to collect the rents for the defendant. Nothing is shown authorizing him to make a contract or leasing of the room for a period of time and accept an advancement of rent. It is true that Peter Teib testified that Scherer told him that he was the agent of defendant. This, however, is denied by Scherer but if true this would not prove the authority of the agent. Authority cannot be proven by the declarations of the agent himself and this would be especially true as Teib admits that Scherer

told him he had no authority to make a lease, that he was only acting as agent. We are of the opinion that Scherer was only authorized to collect the rents and had no authority to lease for a period and collect the rents in advance. He was only a special agent and plaintiff had notice of such facts as to put him on inquiry as to the authority of Scherer and having failed to make inquiry and ascertain the real authority of Scherer he acted at his peril in accepting a lease from Scherer. Blacker vs. Sun Oil Co., 187 111., 32.

It appears from the evidence of Scherer that at the time of making the lease to plaintiff that he had a conversation with the representatives of plaintiff in which he told them ^{he} he was lessee of the property under a ninety-nine year lease. That under that lease he had to make certain payments to Nelson and that if he fell down in his payments that the plaintiff could protect himself by taking his place and collecting the rents and paying the rental to Nelson as provided in the ninety-nine year lease. It is true this is denied by the representatives of plaintiff. Taking the testimony, however, of Scherer and the representatives of plaintiff all together it appears to us that such facts were brought to the knowledge of the plaintiff as to put him upon inquiry as to the extent of the apparent authority of Scherer to make such a lease, and having failed to make inquiry of defendant to ascertain the real authority of Scherer it cannot now excuse itself for paying the money to Scherer upon the ground that he had apparent authority to make such a lease and receive such advancement of money. Plaintiff

was put on guard not only by the fact that he was dealing with an agent but with one who had told him that he had no authority to make the lease. There is nothing in this record that we have been able to ascertain that would justify the plaintiff in assuming that Scherer was authorized to act as the agent of defendant. It was the right and duty of plaintiff to ascertain and determine whether or not the act of leasing came within the power of Scherer to bind the defendant. *Strawn Farmers' Elevator Co. vs. Jas. J. Bennett & Co.*, 165 Tex., 428. The room in question was leased by the defendant to the plaintiff at a rental of \$65.00 per month. The plaintiff and its lessees continued to occupy the room until October 1936 and for a year had failed to pay the monthly rental to the defendant. It is not contended by appellee that Scherer had any right as lessee to make the lease to plaintiff and collect the rents in advance and yet the lease under which plaintiff claims to hold the premises and claims to have advanced the rent was executed by Scherer as lessee, and it appears to us, from the whole of the evidence, that plaintiff knew or ought to have known that the lease under which the payment was made was executed by Scherer as lessee, and that the lease was not valid and binding except it was executed or at least approved by the defendant.

Complaint is made of the giving of the third instruction for defendant in error; we do not think that it is subject to the criticism that it assumes Scherer had no authority to lease the premises. The law on a lease

when taken in connection with the other instructions given, could not be understood as advising the jury that cherer had no authority to lease the premises. The second criticism is not well taken for the reason that there is no evidence of ratification but if there was, the question of acquiescence is provided for in the latter part of the instruction and this question is fully covered by the first and second instructions given for the plaintiff in error. The third criticism is not good, as defendant was entitled to the benefit of any knowledge the plaintiff may have required as to the authority of cherer to lease the premises and there was some evidence tending to show such knowledge. It is conceded that instructions four and six set forth a correct principle of law but it is urged that it was misleading; the plaintiff cannot complain of this as it procured an instruction upon this same subject, statute of frauds; besides, we cannot see wherein it was misleading. The criticism made upon instruction five is not well taken as we think there was evidence tending to show that plaintiff dealt with cherer as lessee, and defendant had a right to have the jury instructed upon this theory. The criticism upon the court's refusal to give two of the instructions offered by plaintiff in error is without merit as the subject of these instructions was covered by others given for it, and no particular reason is pointed out why these should have been given.

The jury was properly instructed in the law, and the law affecting the question of agency was properly submitted to the jury, and the jury has determined the issues

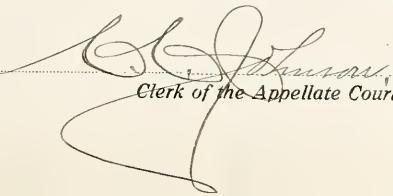
in favor of the defendant, and while the evidence was somewhat conflicting we are not said to say that the verdict was manifestly against the weight of the evidence. There was no reversible error in the rulings of the court and we are unable to say that the verdict and judgment rendered herein should be disturbed, and the judgment of the lower court is affirmed.

JUDGE [Name] [Name]

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 23rd day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

5 4 3

=====

2357

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 126

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Jim Volin,

Appellee

vs.

No. 18

March Term, 1916.

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

St. Louis & O'Fallon Coal Co.,

Appellant

TRIAL JUDGE

HON. GEORGE A. CROW



Term No. 18. In the Appellate Court,
Fourth District.
March Term, A. D. 1916.

Jim Volin,)	
Appellee.)	
vs.)	Appeal from the Circuit
St. Louis & O'Hallon Coal Company,)	Court of St. Clair County,
Appellant.)	Illinois.

Verdict, \$.

The appellee recovered a judgment against the appellant for \$1100.00 and cost of suit, which is sought to be reversed by this appeal.

It appears from the record in this case that the appellant was engaged in the business of mining coal in St. Clair County, Illinois, and on June 21, 1914, gave notice that it had elected not to accept the provisions and any compensation under the compensation act.

The appellee began work for appellant in its mine about two years prior to the injury hereinafter set forth. At the time appellee was injured he was engaged at work in room No. 1 on the back south entry of appellant's mine, in which room he had worked since April 1st. Above the vein of coal in appellee's room was a thickness of slate varying from two to three feet, and above and next to this slate was a rock top. As the mining progressed in the room the slate would fall and leave the rock top exposed, except

Form 100-1

U. S. DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D. C.

THE ATTORNEY GENERAL

WASHINGTON, D. C.

RE:

ALCOHOL & TOBACCO TAXES, 1934-1935
REVENUE ACT, 1934

ALCOHOL & TOBACCO TAXES, 1934-1935

The following information is being furnished to you:

Alcohol and tobacco taxes for 1934-1935 are subject to the provisions of the Revenue Act, 1934, and the Regulations thereunder.

It is requested that you advise the Bureau of the results of your examination.

Very respectfully,
J. EDGAR HOOVER, Director

Enclosed for you are copies of the Revenue Act, 1934, and the Regulations thereunder.

It is requested that you advise the Bureau of the results of your examination.

The Bureau is very interested in the results of your examination.

Very respectfully,
J. EDGAR HOOVER, Director

Enclosed for you are copies of the Revenue Act, 1934, and the Regulations thereunder.

It is requested that you advise the Bureau of the results of your examination.

Very respectfully,
J. EDGAR HOOVER, Director

Enclosed for you are copies of the Revenue Act, 1934, and the Regulations thereunder.

It is requested that you advise the Bureau of the results of your examination.

Very respectfully,
J. EDGAR HOOVER, Director

Enclosed for you are copies of the Revenue Act, 1934, and the Regulations thereunder.

that within five or six feet of the working face the slate would adhere to the roof so that very few props were used in the room. In fact none, except as were necessary to prop slate within a few feet of the face of the work. The vein of coal in this room was about seven feet thick. It appears from the evidence that on April 15, 1915, and while appellee and his buddy were engaged at work in this room they were having trouble with the slate falling and it became necessary to prop the slate to prevent its injuring the workmen, and on this day, which was the last day that the mine worked, before the day that appellee was injured, the mine manager of appellant was in appellee's room just before noon and while there appellee and his buddy demanded of the mine manager some props to be used in the cropping of this slate. The mine manager called their attention to the fact that they had props in the room and they advised him that they were too short. He thereupon measured them and found they were from six and half feet to about seven feet two inches long. He then took the measurement from the roof to the floor and determined that it would require props of the length of seven and one half feet for use in that place and promised to send them in some props of the proper length. The testimony of appellant tends to show that when he went out in to the entry he met the driver Joe Backs and that he and the mine manager gathered up some props seven and one-half feet long and loaded them in to a car and directed Backs to take them into appellee's room. The mine did not work

on the 14th but on the 15th of April appellee and his buddy undertook to set a prop under the slate and claimed that the prop was too short and that it became necessary to put a cap piece on top of the prop to make it of sufficient length to secure the roof and that while engaged in knocking off a projection or knoll from the roof, for the purpose of placing a cap piece on the prop, that the slate gave way and fell upon the appellee and injured him. The evidence introduced on behalf of the appellee tends to show that the mine manager did not furnish the seven and one-half foot props and that the driver did not bring them into the room as claimed by appellant.

The Declaration in this case contained but one count, in which it is charged that appellee demanded long props of the mine manager and that the defendant wilfully failed and omitted to furnish such long props as demanded and as were required. Also alleges that such props were needed to prop the roof and that by reason of the failure to furnish such props the appellee was injured.

Several errors have been assigned by appellant but only three have been argued. The first complaint made by counsel for appellant is upon the question of furnishing props. It is admitted by counsel that appellee made a demand for long props for the purpose of securing the slate in this room, which demand was made shortly before noon of April 13th. That there were a number of long props in the room but none of them of sufficient length to support the slate, and the mine manager ascertained that seven and one-

half foot props were required for this purpose, and it is contended that the mine manager furnished four of the seven and one-half foot props. The evidence upon the question as to whether or not these props were furnished was quite conflicting. The mine manager J. L. Green, testified that immediately after he left the room he secured the driver Lepka and that they loaded four seven and one-half foot props into a car and that he directed the driver to take the car in to this room and that he saw him going in that direction. Lepka on his examination in chief states that he took the car to the room but says he cannot tell when it was but that it was between two and four days before the accident; that he did not measure the props or unload them. On cross examination he says, "If it was before the accident or after I am not sure about that. Those were the props that Mr. Green and I loaded up". About twenty minutes after the accident Green and the assistant mine manager, John Taylor, were in the room and Taylor said that there were two props there under the slate, he did not know what the length of them was, and that there were four other props in the room and that he took a measurement of them and that they were six and one half and seven feet and some a little over seven feet long. It is quite apparent that there is an irreconcilable conflict in the testimony of the witnesses of appellant and those of appellee with reference to the delivery of the props that were furnished. If the witnesses of appellant are to be believed then the

props were delivered as appellee requested but if the testimony of the witnesses of appellee is to be relied upon then the props were not delivered and appellee was using short props for the purpose of securing the roof when he was entitled to have his props seven and one-half feet long. It seems to us that under such a conflict of testimony that we would not be warranted in saying that the witnesses of appellant were telling the truth about this and the witnesses of appellee were misrepresenting the facts. The witnesses were examined before the jury, the jury heard their testimony and saw their conduct while upon the witness stand, and under the law they were the proper ones to determine who was telling the truth about this matter and unless this court can say that the verdict is manifestly against the weight of the evidence then under the repeated decisions of this and the Supreme Court we have no right to disturb such finding.

The question as to whether or not the props were furnished as demanded was submitted to the jury and the jury were advised that if such props were furnished that they should find the defendant not guilty. The jury found that the props were not furnished and we do not believe that we have any right to disturb this finding.

It is next contended that the verdict is defective. The evidence of appellee and his witnesses tends to show that he has what the doctors call an incomplete fracture of the four fingers of the left hand and, as the doctor testified, an incomplete fracture is where the bone has not been com-

rated through altogether, a half side or three-fourths side holds the bone in place. And he says it is still a fracture and that the fingers are stiff and disabled and that he can close the hand about half way in the palm but that he never can close his fingers shut to hold anything tight. The doctor also says, "I found other injuries near the hip on the left side. The iliocecal bone was fractured. From my examination and experience as a physician and surgeon that injury to his side, the hip, is permanent". The appellee also testified to his injuries and that he was unable to do any work and had been for several months. The physician for appellee secured an x-ray picture of the hand and claimed that it showed the fracture. There were other doctors, witnesses for appellant, who say that they were not able to see from this x-ray picture any injury to the bones of the fingers. Witnesses for appellant testify that appellee made no complaint of the injury to his hip at the time he was hurt and that he walked from the place of his injury to his home, a distance of about two miles. That he failed and refused to try to use his hand. Appellee says he endeavored to use his hand but was unable to do so. If the hand and hip of appellee were injured as the testimony of the appellee and his witnesses show them to have been injured, and he lost the time from work as claimed, we cannot say that the verdict is excessive. In connection with this point counsel for appellant have argued that the excessiveness of this verdict was

brought about by the cross-examination of Loyce, one of appellant's witnesses, who had testified that he made up four reports and it was for that reason that he noticed the appellee at the time he was injured. Upon re-examination by counsel for appellant he was asked with reference to whom these reports were for and he testified, "One to Mr. Johnson, one to the main office and one for myself. I know there is a copy that goes to the state authorities. Then upon cross-examination counsel for appellee asked the following question, "Q.-Who is Mr. Johnson to whom you made a report? A.-He is the insurance man." To this counsel for appellant objected and the objection was sustained, and now it is insisted that because it was developed upon cross-examination that Johnson was an insurance agent that it was highly prejudicial to the appellant and this caused the excessive verdict to be rendered. The court promptly sustained the objection to the answer as to Mr. Johnson being an insurance agent. It appears from the record that when Doctor Huey was on the witness stand that he testified to the injuries of appellee and was the first physician that attended appellee. On cross-examination he testified that he ~~xxx~~ told some one connected with the defendant company what he knew about the case and then said that Mr. Johnson was the one that subpoenaed him and that he talked to Mr. Johnson about the case. We are unable to say that it was error to permit counsel to ask Doctor Huey if he had talked about this injury. It is said by counsel for appellant that at the time counsel for appellee asked the

The first of these is the fact that the
 Government has not yet decided whether
 it will accept the offer of the
 United States to purchase the
 Alaska Pipeline. This is a
 very important question, and
 one which will have a
 great effect on the
 future of the country.
 The second is the fact
 that the Government has
 not yet decided whether
 it will accept the offer
 of the United States to
 purchase the Alaska
 Pipeline. This is a
 very important question,
 and one which will have
 a great effect on the
 future of the country.

questions of Doctor Lucy that they knew Johnson was the representative of an insurance company. There is nothing in the record showing that to be a fact and counsel for appellee deny such knowledge but say they supposed he was a special investigator for the appellant, but whatever the facts may be about this we cannot say that there was such error in this as to require a reversal of this case and we do not believe that the point made by counsel for appellant, that the jury were induced by this statement to render an excessive verdict, was well taken, as we have heretofore seen that under the evidence the verdict was not excessive.

It is next argued by counsel for appellant that the court erred in admitting the certified copy of the notice filed by appellant with the Industrial Board of its election not to operate under the compensation law. It is insisted that the certificate of the clerk of that board is insufficient for want of a proper certificate of the clerk. It is said that it fails to state that he hereby certifies that he is custodian and keeper of the files, record, etc., of the industrial board, and that under Section 10, Chapter 51, which provides "The certificate of any such clerk of a court, city, village, town, county, or secretary, clerk, cashier or other keeper of any such papers, entries, records or ordinances shall contain a statement that such person is the keeper of the same, and if there is no seal shall so state. The certificate complained of states, "I, J. M. Bonner, Secretary of the Industrial Board of Illinois, custodian and

[illegible]

keeper of all the files, records and documents thereof, do hereby certify that the foregoing is a true, correct and complete copy of notice filed with this court by the St. Louis & O'Fallon Coal Company of East St. Louis, Illinois, on the 30th day of June 1918. I further certify that the original notice is now on file in my office and has not been withdrawn, etc." To which a seal is attached. It seems to us that this certificate contains a statement that he is the keeper of the same as it says, "I, J. A. Connolly, Secretary, etc., custodian and keeper of all the files, records, etc., do hereby certify, etc." A reasonable construction of this certificate certainly is a statement that he is the keeper of the files and papers; while it may not be technically correct, it is substantially so and covers, as we believe, the thing necessary under said section 16 of Chapter 51 of the Revised Statutes. We don't vary with it if it is necessary that he should state this as under the statute he is required to keep these records, files and papers, and this court held in the case of East St. Louis Coal, Light & Coke Co. vs. City of East St. Louis, 48 App., 503, that "the omission to state in the certificate that the clerk was the legal keeper of the records was immaterial as the statute, of which the court takes judicial notice, makes him such."

It is also insisted that it was error to admit witnesses to testify as to the contents of the notice that was posted at the mine. It appears from the evidence that the original posted at the mine had been faded and destroyed by the weather so that you could not read it clearly, and

we can see no reason why witnesses should not be permitted to testify as to the contents of a notice that had been posted. The mode of proof adopted in this case with regard to the proving of the election not to come under the compensation act was approved in the case of *Intestates of Interville & Biguddy Coal Company*, 188 Am., 357. We know of no rule of law, and none has been pointed out by counsel, that prohibits witnesses from testifying as to the contents of any notice that has been posted, especially where the notice referred to has become dimmed and destroyed.

We cannot say in this case that the verdict of the jury was manifestly against the weight of the evidence, or that there was any substantial error committed by the court in the trial of the case, and the judgment of the lower court is affirmed.

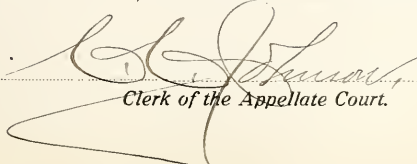
JUDGES OF THE COURT.

Not to be reported in full.

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this.....18th..... day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

1111

=====

2388

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Clemeth January,

Appellee

vs.

No. 22

March Term, 1916.

Metropolitan Life Insurance Co.

Appellant

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW

Term No. 22.

In the Appellate Court,

March Term, 1916.

Fourth District.

March Term A. D. 1916.

Clemeth January,
Appellee.

vs.

Metropolitan Life Insurance
Company,
Appellant.

}
}
} Appeal from the Circuit Court
} of St. Clair County.

McGrade, J.

The appellee recovered a judgment against the appellant in the court below for \$175.51, and costs of suit, to reverse which this appeal is prosecuted.

It appears from the record and files herein that the appellee has failed to file any brief in this case, as required by the rules of this court.

It is therefore ordered that the judgment of the lower court be reversed pro forma as provided may be done under rule 27.

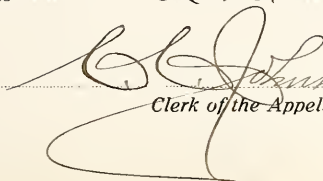
The judgment of the lower court is reversed and the cause remanded.

Wm. H. H. H. H. H.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 23rd day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....

2387

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 128

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Mattie Anderson, Admr., etc.,

Appellee

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 28

March Term, 1916.

Pulaski COUNTY

Hiram Chittick,

Appellant

TRIAL JUDGE

HON. BENJAMIN W. POPE

Term No. 28. In the Appellate Court, Canada No. 8
Fourth District.
March Term . . . 1911.

Lattie Anderson, Admx.,
of the estate of Martha Topley,
deceased,
Appellee.
vs.
Hiram Chittick,
Appellant.
Appeal from the Circuit
Court of Lincoln County.

Per Curiam.

It appears from the record on this case that on February 29, 1906, Martha A. Topley sold and conveyed by deed of warranty to appellant the south west quarter of the north east quarter and the north half of the north east quarter of the northeast quarter, Sec. 28, Township fifteen South, Range one east of the Third Principal Meridian, for a consideration of \$1200.00. That said Topley said her in cash six hundred dollars and gave her a mortgage upon the said lands to secure the remaining six hundred dollars. It appears that later on other portions of land in the northeast in the said lands and at the October Term of the Circuit Court of Lincoln County, 1907, appellant instituted a suit in partition and at the said Term of said court a decree was rendered dividing said land among and others were the heirs of and entitled to said lands.

THIS IS TO CERTIFY THAT THE FOLLOWING IS A TRUE AND CORRECT COPY OF THE ORIGINAL AS SUBMITTED TO THE COMMISSIONER OF THE GENERAL LAND OFFICE

IN WITNESS WHEREOF

THE COMMISSIONER OF THE GENERAL LAND OFFICE

Attest my hand and the seal of the Commission of the General Land Office this 1st day of January 1901

JOHN W. HARRIS
Commissioner of the General Land Office

100-100000

TO ALL WHOM THESE PRESENTS SHALL COME, I, JOHN W. HARRIS, Commissioner of the General Land Office, greeting.
WHEREAS, by an Act of Congress, approved March 3, 1879, entitled "An Act to provide for the disposal of the public lands," it is enacted that the Secretary of the Interior should cause to be made and published a list of the public lands in each of the several States and Territories, and that the same should be kept up to date by the addition of new lands and the deletion of lands no longer in the public domain;
AND WHEREAS, by an Act of Congress, approved March 3, 1879, entitled "An Act to provide for the disposal of the public lands," it is enacted that the Secretary of the Interior should cause to be made and published a list of the public lands in each of the several States and Territories, and that the same should be kept up to date by the addition of new lands and the deletion of lands no longer in the public domain;
AND WHEREAS, by an Act of Congress, approved March 3, 1879, entitled "An Act to provide for the disposal of the public lands," it is enacted that the Secretary of the Interior should cause to be made and published a list of the public lands in each of the several States and Territories, and that the same should be kept up to date by the addition of new lands and the deletion of lands no longer in the public domain;
AND WHEREAS, by an Act of Congress, approved March 3, 1879, entitled "An Act to provide for the disposal of the public lands," it is enacted that the Secretary of the Interior should cause to be made and published a list of the public lands in each of the several States and Territories, and that the same should be kept up to date by the addition of new lands and the deletion of lands no longer in the public domain;
AND WHEREAS, by an Act of Congress, approved March 3, 1879, entitled "An Act to provide for the disposal of the public lands," it is enacted that the Secretary of the Interior should cause to be made and published a list of the public lands in each of the several States and Territories, and that the same should be kept up to date by the addition of new lands and the deletion of lands no longer in the public domain;
AND WHEREAS, by an Act of Congress, approved March 3, 1879, entitled "An Act to provide for the disposal of the public lands," it is enacted that the Secretary of the Interior should cause to be made and published a list of the public lands in each of the several States and Territories, and that the same should be kept up to date by the addition of new lands and the deletion of lands no longer in the public domain;
AND WHEREAS, by an Act of Congress, approved March 3, 1879, entitled "An Act to provide for the disposal of the public lands," it is enacted that the Secretary of the Interior should cause to be made and published a list of the public lands in each of the several States and Territories, and that the same should be kept up to date by the addition of new lands and the deletion of lands no longer in the public domain;
AND WHEREAS, by an Act of Congress, approved March 3, 1879, entitled "An Act to provide for the disposal of the public lands," it is enacted that the Secretary of the Interior should cause to be made and published a list of the public lands in each of the several States and Territories, and that the same should be kept up to date by the addition of new lands and the deletion of lands no longer in the public domain;

twenty-six three thousandths part of said land and a sale thereof was ordered and the appellant was compelled to re-urchase the land at such partition sale. It also appears that he had paid considerable money to different ones of the heirs for their interest therein and had paid a small portion of this note to Martha Torley. It further appears that when Martha Torley's attention was called to this matter that she was willing to re-indorse the appellant for the amount of money that he had expended in protecting his title, and as testified to by some of the witnesses, she stated that he had paid out an amount equal to or greater than the balance due upon the land and that she was willing to release the mortgage. That on May 17, 1911, she executed and delivered to the appellant a release of said mortgage and agreed therein to dismiss this suit of foreclosure. This release was acknowledged before W. F. Larson, Notary Public. An attempt was made at one time, as appears from the testimony of one of the witnesses, to dismiss the suit of foreclosure but for some reason was not successful and thereafter the suit proceeded to a hearing with a decree against appellant for the full amount of the said note secured by said mortgage. It is to reverse this decree that this appeal is prosecuted.

Appellee has entered a motion in this case to dismiss this appeal for two reasons: 1st.- to claim that the evidence was heard by the chancellor at the oral hearing, taken under advisement and decided thereon in

Twenty-five years ago, the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

the first of the...

vacation on October 2, 1915, the day said court convened for its regular October term. An appeal was granted on October 29, 1915 and perfected before the next succeeding April term, 1916. The decree is therefore not final until the second day of the April term, 1916, and the appeal is premature." It appears from this record that the decree was taken in open court and rendered in open court at the October term 1915.

As to the second point made, that the Chancellor who heard the cause granted the appeal, and not the Judge presiding; when a Judge has rendered a decree he can see no reason why another Judge might not at the same term permit an appeal from that decree and enter an order to that effect. We do not believe that the points are well taken and the motion to dismiss the appeal is denied.

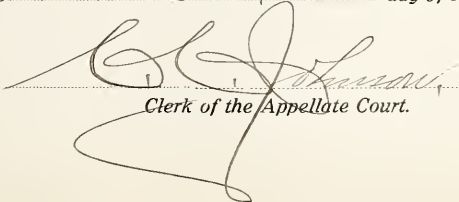
It is contended by counsel for appellant that there is no evidence in this record which will warrant the court in rendering a decree of foreclosure and sale herein. There is no question but what it appears from this record that Martha Tapley sold the lands in question to appellant and made him a warranty deed therefor, and that the title to said lands partially failed and that a portion of the land was taken from the appellant and that he expended considerable money in perfecting his title. It also appears that Martha Tapley realized that she had sold lands that did not belong to her and that the appellant had been deceived and expended considerable money in perfecting the title and, as appears from the testimony of appellant and his sister,

that she stated that appellant had paid the heirs and her and she did not want him to pay the debt twice. That he had already paid for the land. It also appears that she was willing to release the mortgage and deliver by the notes to appellant. It also appears that in accordance to an understanding had between Martha Linsley and appellant that she did on the 17th day of May 1911, in the presence of J. L. Harmon and J. L. Wilson execute a release of the said mortgage, which release was also acknowledged before J. L. Harmon, a Notary Public. It is admitted by complainant and alleged in the bill that this release was executed by Martha Linsley but it is claimed that it was obtained by fraud and was without consideration and for that reason void. We have examined the record carefully and have not been able to find any evidence in this record tending to show that this release was procured by fraud or by false representations and none has been pointed out by counsel for appellee. It is insisted, however, that there was no consideration for the release and for that reason it was not binding. We cannot agree with counsel in this contention that the release was without consideration, as it appears clearly, and is not disputed, that appellant had an interest in the land, and while it is denied that appellant paid the amount of money that he claimed to have expended in protecting his title, it is not denied, and could not be, that he had expended some considerable money in protecting the interests of other persons in the land, and this would be valuable consideration for this release.

It is further insisted by counsel for the defendant that the record filed herein is not sufficient for this court to take cognizance of, because he says that no certificate of evidence is contained in the record. The court examined the record carefully and find that at the conclusion of the testimony as contained therein these words, "and as it is remembered that on the trial of this cause before the honorable D. W. Love acting Circuit Judge, according to the plaintiff to sustain the issues on which he introduced the following evidence, to wit: to say; at the conclusion of the purported certificate of evidence to file, after the defendant had rested in case, the following statement, "this was all the evidence heard upon the trial of this cause", and this is signed by Theodore W. Love, Circuit Judge, but immediately following that, we find a regular certificate of Benjamin W. Love, presiding Judge, making and returning matters, including all this testimony, a part of the record herein. It is said that this is only a certificate of the reporter and that that is not sufficient. It is argued that counsel that the certificate of a reporter is not competent to make the testimony of witnesses a part of the record in a case and if that were all that this record contained we would not hesitate to disregard it, but in this case, following the signature of the reporter and the statement that the foregoing was all of the evidence in the case, we find a certificate and signature of the Judge thereof, and we do not think that the mere fact that the reporter signed it, which was unnecessary, should destroy its validity.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 23rd day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....

2370

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 129

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

(R'dg denied Jan 13 1917)
(4-6-17)

Iva Dallas,

Appellee.

ERROR TO
APPEAL FROM

vs.

No. 32.

Circuit COURT

March Term, 1916.

East St. Louis and Suburban Rail-
way Company,

Madison COUNTY

Appellant.

TRIAL JUDGE

HON. LOUIS BERNREUTER

Dec. No. 53

In the Appellate Court,

Vol. 47.

State of Illinois,

Fourth District.

March Term, A. D. 1916.

Iva Ballou

Appellee,

vs.

Appeal from the Circuit Court

East St. Louis and Sub-
urban Railway Company,

of Madison County, Illinois.

Appellant.

Caride, J.

The appellee recovered a judgment against the appellant for eight thousand dollars (\$8,000), a reversal of which judgment is sought by this case 1.

There was a former trial of this case in the circuit court, a judgment obtained by the appellee, and an appeal was prosecuted to this court, and at the March term, 1915, the case was reversed because the verdict on the jury was manifestly against the weight of the evidence as to the negligence of the appellant and as to the want of due care of the appellee, and the case was remanded for another trial.

Upon the questions of negligence and want of due care on the part of the appellee, the evidence submitted in this record is substantially the same as that in the former record. In our former opinion, we went into the details of

1890
 1891
 1892
 1893
 1894
 1895
 1896
 1897
 1898
 1899
 1900

1901
 1902
 1903
 1904
 1905
 1906
 1907
 1908
 1909
 1910

1911
 1912
 1913
 1914
 1915
 1916
 1917
 1918
 1919
 1920

1921
 1922
 1923
 1924
 1925
 1926
 1927
 1928
 1929
 1930
 1931
 1932
 1933
 1934
 1935
 1936
 1937
 1938
 1939
 1940
 1941
 1942
 1943
 1944
 1945
 1946
 1947
 1948
 1949
 1950
 1951
 1952
 1953
 1954
 1955
 1956
 1957
 1958
 1959
 1960
 1961
 1962
 1963
 1964
 1965
 1966
 1967
 1968
 1969
 1970
 1971
 1972
 1973
 1974
 1975
 1976
 1977
 1978
 1979
 1980
 1981
 1982
 1983
 1984
 1985
 1986
 1987
 1988
 1989
 1990
 1991
 1992
 1993
 1994
 1995
 1996
 1997
 1998
 1999
 2000

the testimony of the several witnesses upon those questions and do not deem it necessary to repeat it. Counsel for appellee however say that the testimony of Louis Wells is fuller and more complete upon this trial, and that it is of such a character as to corroborate the testimony of appellee. This record discloses that upon the earlier trial Louis Wells testified that he was in his yard engaged at work and that he knew nothing about the accident except in so far as his attention was attracted to the fact that an accident had happened, and that he did not know what occurred prior to her falling upon the pavement; that he was asked these questions:- Q. "Did you see it jerk?" A. "Not what I termed." Q. "Did you see the car jerk?" A. "Well, it seemed to jerk, to me it seemed to almost stop and then go forward." Q. "Then Mrs. Dallas was lying on the ground?" A. "Yes sir. I did not see her fall off the car." Upon the present trial he says: "I observed the car as it approached Mycmore street traveling in a westerly direction. The car was coming along and as it got a little before the midway of Mycmore street it seemed to almost stop and then started suddenly forward." He then says: with reference to the place, "I saw the car almost stop, then go forward. Mrs. Dallas was just about at that place about ten or fifteen feet in the rear of the car lying there unconscious." When upon cross examination he was asked this question- "When when you talk about a jerk, that jerk, was a jerk that you talked about with the car fallen out?" A. "Before the car fallen out. I did not see

the car jerk twice. Well, it jerked before and started suddenly off, that is what I would call a jerk after she had fallen.' It is considered now that the testimony of this witness discloses that he saw the car jerk before Mrs. Dallas fell to the ground. We do not believe that this testimony, when all considered, is susceptible of this interpretation, for he says that he only saw the car jerk one time, and then says that she was ten or fifteen feet in the rear of the car; and when he speaks of there being two jerks of the car later on he describes it as being the stopping of the car for one and the starting of the car for the other. We do not believe that the witness intended to say that he saw the jerk of car that threw Mrs. Dallas off of the car as claimed, and if the testimony at this time was susceptible of such interpretation it would be wholly inconsistent with his former testimony and of little value; besides Wells was not in a position to see and know what occurred with reference to the jerking of the car. The position of the five witnesses described in our former opinion certainly made their testimony much more reliable than the testimony of Wells, as those witnesses were on the car and in a position to know what transpired.

There was one other matter developed upon the examination of Mrs. Dallas that we wish to make plain why she stepped out of the car while it was in motion. She says: "Prior to my stepping over the door-sill or on the platform to the vehicle, I thought the car had stopped

I think it had stopped - and then I got out in the vestibule, and then it jerked." Q. "Now did it stop or almost stop, which do you say now is right?" A. "I think it had stopped." Q. "All you may be mistaken about that." A. "I don't think I am." Q. "You think it had stopped?" A. "Yes, sir. It appears from these answers that at the time she stepped out into the vestibule she was of the opinion that the car had stopped, which was a mistake and tends to show that she was not observing the movements of the car but was absorbed in thought about other matters and not giving proper attention to alighting from the car. We do not believe the additional testimony improved appellee's case; we are still of the opinion that the verdict of the jury is entirely against the weight of the evidence both on the question of negligence of the defendant and the due care of the plaintiff, and the judgment of the lower court will be reversed without remanding.

The opinion written in the former case is not published in the reports and for that reason we attach hereto a copy of the former opinion and make it a part of the opinion in this case, except as to the remanding of the case. The judgment of the lower court is reversed.

We find as a fact that the defendant was not negligent in the operation of its car and that it was not liable, and we further find that the plaintiff was not at the time in the exercise of due care for her own safety.

Iva Dallas,
 Appellee,
 vs.
 St. Louis - East St. Louis
 Railway Company,
 Appellant.

Appeal from the Circuit Court
 of Madison County, Illinois.

Charles J.

Upon a trial of this case the plaintiff obtained a judgment in the court below for three hundred dollars, which the defendant seeks to reverse by this appeal. The declaration which consisted of one count alleges that on October 1, 1913, plaintiff was possessed of and operating an electric railroad in the city of Collinsville, Madison County, Illinois. That appellee was a passenger on appellant's car for reward, to be carried from Broadway Street to Jaymore Street in said city a reasonable time to allow plaintiff to alight therefrom; that defendant not regarding its duty in that behalf, and when said car arrived at plaintiff's destination, and while plaintiff with all due care and caution was upon the rear platform of said car for the purpose of alighting therefrom, suddenly and unlawfully by its servant caused the speed of the car to be reduced and almost stopped and then without warning to the plaintiff and before said car had wholly stopped, and while plaintiff

was allowed opportunity to alight from said car, suddenly and violently caused said car to be jerked, thereby throwing the plaintiff with great force and violence from off said car upon the ground, or paved street, by means of which she was permanently injured. To this declaration the appellant filed the plea of general issue.

It appears from the evidence in this case that appellant was operating an electric railway between Collinsville and Joplin and that about noon of the 10th day of October 1912, appellee became a passenger to be carried from Leeperie street to Joplin street in Collinsville, upon a west bound car. The final destination of appellee was Joplin, but she desired to stop at Joplin street for the purpose of delivering some orders to a Mr. Ellis who lived near said street. She claims that shortly after becoming a passenger upon said car she asked the conductor if he would stop the car at Joplin street long enough to permit her to deliver some orders to Mr. Ellis; that he told her they were behind time and could not do so and she thereupon paid her fare to Joplin street. The conductor, however, denies having told her that he could not stop long enough at Joplin street to permit her to deliver the orders and claims that he intended to stop for her at that street, and claims that just before arriving at said street he gave the motorman a signal to stop there. Appellee claims that after passing the last street before reaching Joplin street, that it became apparent to her that the car was stopping to stop at Joplin street and she seized the button on the

side of the car and gave the motorman himself the signal to stop there; that the car began to slacken its speed and just before reaching the street she arose from her seat and walked to the rear end of the car and stepped out into the vestibule when the car gave a sudden jerk and threw her from the car on to the pavement, injuring her very badly. The appellant denies that the car started suddenly or jerked and threw her off of the car, but claims that she walked out into the vestibule and then on the steps and jumped off of the car before it stopped.

The principal question in dispute in this case is, did the appellant, after the car had come out to the vestibule of the car and while the car was being slowed down, start up the car with a sudden jerk and then sculler on to the pavement, and did she step into the vestibule and wait for the car to stop or attempt to get off of the car while it was in motion?

It is insisted by counsel for appellant that the verdict of the jury is manifestly against the weight of the evidence in this case and this is the vital matter presented to us for determination. It appears from the evidence that there were about fifteen passengers on board this car at the time of the injury, and appellant stands practically alone in her contention that the car after slowing down started up suddenly and gave a jerk and threw her off, and five of the passengers that were on board the car, the motorman and conductor all say that the car did stop in a jerk, and three of the passengers testified that she jumped off of

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

... of the ... and ...

the car without waiting for it to stop. Appellee testified, "As the car neared Lycamore Street I saw the conductor was busy changing fares; three or four girls got on and I thought he was not going to ring the bell, so I pushed me well myself and walked to the back end of the car and there it almost stopped. I stepped into the vestibule and I thought they were going to stop; I don't remember anything until they carried me into the doctor's office. I stepped out to the rear platform with the intention of, as soon as it stopped, to alight, but there was a jerk and I don't remember anything more until they carried me into Doctor Lee's office. The street was paved. I don't know how I struck the pavement. This is the whole of appellee's testimony in support of her declaration that the car gave a sudden jerk after she got out into the vestibule. Counsel for appellee contends that Louis Wells testified that the car gave a sudden jerk. Wells testified that he lived west of where the railroad crosses Lycamore Street. It appears that immediately after Mr. Wells fell on the pavement that Ambrosat, one of the passengers caught the bell rope and gave two signals and the conductor immediately gave a third, or fourth signal, to stop immediately and that the car then stopped suddenly. Mr. Wells in his examination in chief says nothing about the car stopping or jerking but on cross examination he says, "Did you see the car jerk? I fell off and it jerked to me, it seemed to almost to jerk me down." --- on Mrs. Wallas was lying on the ground. I did not see her fall out of the car". Mr. Wells at least

one hundred feet west of the car and we are satisfied that he did not observe the movements of the car until after Mrs. Hollas had fallen on the pavement and this is what attracted his attention to the car.

It is next contended by counsel for appellant that Henry Pecke, a witness for appellant, testified that the car stopped awful sudden; which is true, but on the road this witness's testimony the sudden and unusual stop referred to by him occurred after Mrs. Hollas fell on the pavement and was in consequence of the danger signal given. He says, "My attention was attracted by the unusual stop; the car stopped awful sudden. The motorist was in the front of the car and he came past us and we saw there was something unusual. I don't know that there were any signals given. I would not say that there were none given. Prior to the time my attention was attracted by the stopping of the car I know of nothing unusual by the motion of the car. I didn't know who had gotten off of the car". While upon the part of the witnesses for appellant the motorist Edward Rosen testified, "There was no violent jerk or sudden stop of the car prior to the sounding of those signals I testified about". (referring to danger signals). "There was just the usual stop or stopping of the car until I received the bells then I may have made a violent stop, or unusually sudden stop".

Jacquet, the conductor says, "I was in the car moving to a stop just as nice as you could and the car stopped on the car, in the broken. When the car stopped, very slow, about to come to a stop, I heard two bells".

Joe Ambrosini, a passenger upon the car testified, "Prior to the time I gave the two bells after Mrs. Holmes stepped off there was no unusual motion or jolt of the car". And again, he says, "I saw this lady get off the car; I saw her walk out; when she came out of the door she just walked out. Had a little bundle in her hand, with a handle on it and walked right off. Seemed to me like she didn't pay no attention to nothing; just walked right on out. I saw her when she came out in the vestibule she was walking fast; when she got outside of the door she just walked right off; had her pocketbook and a little bundle in her left hand. She was holding it in this way, and as she walked out she grabbed the handle with her right hand and walked right on out; she grabbed the handle, facing the back of the car, as she walked out; that is the handle at the rear end of the car. She didn't stop at the rear end of the car, she didn't stop anytime in the vestibule. She was running. I don't remember just how she got on, I know she walked off. She was facing out towards the door, out the door. She was holding on to a grab handle; and her right hand holding the grab handle. She was facing out from the car in the act of getting off. Her legs were turned towards the rear end of the car.

George Wilson, another passenger, testified, "Just at the time that the two signals were given by the engineer, and while the car was slowing down, there was no unusual jolt of the car, nothing more than usual". He saw the lady get off the car and step out into the vestibule and walk out, as usual.

of the vestibule; she seemed to be in a hurry. I didn't see her stop at the door leading from the car proper into the vestibule. She didn't stop anywhere from the time I saw her in the aisle going out. She just walked right out of the car into the vestibule and turned and walked right out of the vestibule. When she went off of the car she stepped in the opposite direction the car was going. When she walked out into the vestibule she faced the door; when she came into the vestibule and started out she turned around in the direction the car was going".

C. W. Reed, another passenger, testified, "Immediately prior to the time Mrs. Louisa stepped on walked off of the car it was coming to a stop. There was no jerk of the car before she walked off; she was walking to her usual stop. I never noticed Mrs. Louisa until she got on the rear platform, she was walking /all the way, she just walked straight off".

The witnesses Ambrosia, Wilson and Henry were standing on the rear platform. Henry Ambrosia, William Ambrosia, who was seated in the car, says, "First of all and the only attention was attracted by the stopping of the car. I didn't know of nothing unusual about the action of the car. I didn't know who had gotten off the car".

Paul Fisher, another person on the car, testifies prior to the time his attention was attracted to the car was nothing unusual about the action of the car. Henry Ambrosia, another witness, says, "Nothing unusual was given there was no unusual action of the car. I didn't know

just the ordinary starting of the car.

The evidence of the witnesses for appellant greatly preponderates over the testimony of appellee in showing that the car did not stop with a sudden jerk, as testified to by appellee and also that she did not step in but vertically out walked straight out and attempted to get off the car while it was in motion. We can see no motive or interest that these witnesses could have in telling an untruth about this matter and no reason why the credit should not be accorded to their testimony. While it is the duty of a court of review to sustain the verdict of a jury where it can reasonably be done, but where courts of appeal upon the consideration of the testimony find that the verdict of the jury is greatly against the weight of the evidence, then it becomes the duty of such appellate court, under the law as it exists in this case, to reverse the judgment of the trial court. *U. S. v. Heinrich*--187 Ill., 388.

We have read this record carefully and feel constrained to hold that the evidence in this case largely preponderates in favor of the appellant, both upon the question of the negligence of the appellant and the want of due care of appellee, and while we agree with the contention of counsel for appellee that it is not reasonable to infer that she intended to commit suicide, nor do we deem it necessary to infer this to sustain the contention and statement of the witnesses of appellant. It may be that she was absorbed in thought about other matters and not giving the proper atten-

tion to alighting from the car but this does not excuse her. While we are compelled to hold that the verdict of the jury is manifestly against the weight of the evidence, yet we are not inclined to reverse with a finding of facts.

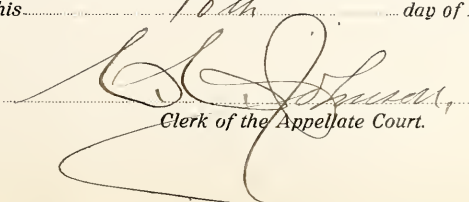
The judgment of the lower court is reversed and the cause remanded.

Reversed and Remanded.

(Not to be reported in full)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this.....18th..... day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

100

100

2391

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 130

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Denison-Gholson Dry Goods Co.,

et al., etc.,

Appellant.

vs.

No. 36.

March Term, 1916.

R. F. Martin, etc.,

Appellee.

ERROR IN
APPEAL FROM

Circuit COURT

Franklin COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON



The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, under the act of March 3, 1879, entitled "An Act to provide for the better management of the public lands, and for other purposes."

Secretary of the Interior, *John W. Foster*
 Commissioner of the General Land Office, *W. A. Henshaw*
 Chief of the Bureau of Reclamation, *John G. Smith*
 Chief of the Bureau of Indian Affairs, *John S. Galt*
 Chief of the Bureau of Fish and Game, *John S. Galt*
 Chief of the Bureau of Geographical Names, *John S. Galt*
 Chief of the Bureau of Land Surveying, *John S. Galt*
 Chief of the Bureau of Mineral Lands, *John S. Galt*
 Chief of the Bureau of Public Lands, *John S. Galt*
 Chief of the Bureau of Surveying and Mapping, *John S. Galt*
 Chief of the Bureau of Waterways, *John S. Galt*
 Chief of the Bureau of Wildlife, *John S. Galt*
 Chief of the Bureau of Zoology, *John S. Galt*

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, under the act of March 3, 1879, entitled "An Act to provide for the better management of the public lands, and for other purposes."

Secretary of the Interior, *John W. Foster*
 Commissioner of the General Land Office, *W. A. Henshaw*
 Chief of the Bureau of Reclamation, *John G. Smith*
 Chief of the Bureau of Indian Affairs, *John S. Galt*
 Chief of the Bureau of Fish and Game, *John S. Galt*
 Chief of the Bureau of Geographical Names, *John S. Galt*
 Chief of the Bureau of Land Surveying, *John S. Galt*
 Chief of the Bureau of Mineral Lands, *John S. Galt*
 Chief of the Bureau of Public Lands, *John S. Galt*
 Chief of the Bureau of Surveying and Mapping, *John S. Galt*
 Chief of the Bureau of Waterways, *John S. Galt*
 Chief of the Bureau of Wildlife, *John S. Galt*
 Chief of the Bureau of Zoology, *John S. Galt*

the automobile in question. Upon examining the record to determine what the facts were in the case we find that the purported bill of exceptions was never signed by the circuit judge, and there is nothing to show that the purported bill of exceptions contains all of the evidence and it must be presumed that the evidence was sufficient to support the judgment of the court. The practice is well settled that where the bill of exceptions fails to show that it contains all of the evidence in the case we will not examine whether the evidence it does contain supports the verdict. *People v. Wesley*, 76 Ill., 447. "In the absence of a bill of exceptions showing that it contains all of the evidence the presumption is that the verdict is sustained by the proper evidence." *People v. Willard*, 68 Ill., 113.

It has been repeatedly held by this and other appellate courts that a bill of exceptions must be signed by the trial judge and the certificate must show that it contains all of the evidence in the case, otherwise the presumption is that the evidence was sufficient to warrant the court in the conclusion reached.

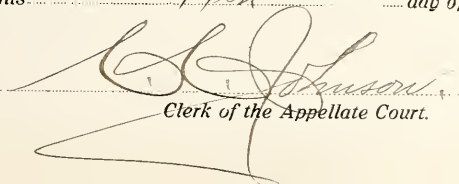
On the reasons above indicated the judgment of the lower court is affirmed.

APPEAL DENIED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 17th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$



2312

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 131

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Knights of Pythias, etc.,

Appellant

ERROR TO
APPEAL FROM

vs.

No. 37

City COURT

March Term, 1916.

East St. Louis COUNTY

Annie Davis,

Appellee

TRIAL JUDGE

HON. M. R. SULLIVAN

• 305 •

March Term A. D. 1916.

Appellee.

Apparel 1100. low city - 100
of 1000. 10. 1000.

2

of". On March 14, 1914 a beneficiary certificate was issued by this order to Joseph Davis, and Anna Davis, his wife, was named therein as beneficiary. This certificate states that it is issued upon the statements made by Davis in his application for membership, the representations and agreements made and subscribed to by him, and the medical examiner's blank and the answers given and certified to by him to the medical examiner, all of which representations, agreements, statements and answers are declared to be warranties and are made a part of the contract and upon condition that the said member complies in the future with all laws, rules and regulations now governing the said lodge and beneficiary department, or that may hereafter be enacted by the grand lodge or beneficiary department to govern said lodge; all of which are also made a part of this contract. By article seven, section one, a beneficiary fund is created for the benefit of the members of the subordinate lodges and their families. Article 7, section 1 of the Grand Lodge by-laws provides "Immediately upon any person becoming charged in a knight rank in any lodge, except a new lodge, he becomes a member of the beneficiary department of this grand lodge. The keeper of records and seal will immediately forward the application for membership of such person, together with one dollar for membership fee and twenty-five cents for certificate, and the proper blanks upon which entry of said amount shall be made, to the secretary of the beneficiary department who shall thereupon issue to such person his beneficiary certificate. Members

of... in 1890... by this order to... was named... that it is... his position... agreements made... examiner's... him to the... agreements, statements and answers... parties and was made a part of the contract and... dition that the... laws, rules and regulations... and judicially... noted by the... Govern said... this contract... fund is created for the benefit of the... ordinary judges and their families... the Grand Judge... becoming charged in a... new judge, he becomes a member of the... ment of this... immediately... person,... twenty-five... upon which... secretary of the... it is to each...

of new lodges become members of this department on the day of the first quarterly report of said lodge after organization". Article 7, Section 4, provides, "When being charged in the knight rank each member shall pay to the keeper of records and seal twenty-five cents for his beneficiary certificate; he shall also pay to the master of finance for each full month of that quarter one dollar for the ensuing quarter in the beneficiary department. Each lodge shall pay to the department for each and every new member, at the time of forwarding his application, one dollar for his membership fee in the department. It is the duty of each knight to pay into the beneficiary fund through his lodge one dollar quarterly and in advance, and it is the duty of the master of finance to collect the same in common with other dues". Article 7, Section 5, provides, that if death occurs within six calendar months from date of being charged in the knight rank twenty-five dollars shall be payable; between six and twelve months, fifty dollars; between twelve and eighteen months, seventy-five dollars; between eighteen and twenty-four months, one hundred dollars; between twenty-four and thirty months, one hundred twenty-five dollars; between thirty to thirty-six months, one hundred fifty dollars; between thirty-six and forty-two months, one hundred seventy-five dollars; between forty-two and forty-eight months, two hundred dollars; between forty-eight and fifty-four months, two hundred twenty-five dollars; between fifty-four and sixty months,

two hundred fifty dollars, and beyond sixty months three hundred dollars. "This section shall apply to new lodges only after filing their report and paying their first quarterly beneficiary tax".

Article 10, Section one, provides, "A member who is unfinancial in one department of the grand lodge of the jurisdiction of Illinois shall be and is unfinancial in all and not entitled to any benefits whatsoever.

Article 8, Section 7, provides, "Any member who permits himself to become non beneficial shall ipso facto stand suspended from the beneficiary department and his certificate shall thereupon become null and void; however, such member may be re-instated in the beneficiary department at any time before suspension from his lodge by paying the full amount of his arrearages, and when demanded by his lodge shall furnish satisfactory proof of his good health..... In no case shall the master of finance accept from the non beneficial member less than the full amount due." Article 8, Section 8, provides "Should a member permit himself to become non beneficial upon re-instatement within thirty days his certificate shall again be in full force and effect, otherwise he shall be subject to Section 8 of Article 7 of the beneficial law the same as a new member and shall lose the benefit of his full time policy and be required, for the purpose of fixing the amount due under his certificate, to start in at the beginning of the first six months period as a new member, unless he re-instates

[illegible]

himself within thirty days. Provided, that whenever any member shall have been once in continuous good standing for five years during continuous membership, and when by suspension, and thereafter shall become nonbeneficial and remain so for more than thirty days, he shall not be subject to Section 5 of Article 7, governing the amount of his certificate for the first five years of continuous good standing, but his certificate shall have value thereof as follows: if death occurs within one year after the date of his last re-instatement in the beneficiary department one hundred fifty dollars shall be payable; if between one and two years one hundred eighty dollars; if between two and three years two hundred ten dollars; if between three and four years two hundred forty dollars; if between four and five years, two hundred seventy dollars; if after five years, the certificate shall then be again of full value. It is also provided that this section shall apply only to members after they shall have been once in continuous good standing for five years. Any members suspended from his lodge applying for re-instatement shall be regarded for this purpose as a new member.

It further appears from the evidence that on October 1, 1914, Davis owed over \$2.50 and his name was placed on the non-beneficial list and so reported to the grand officers and that on January 1, 1915, he was still in arrears to the amount of \$5.75 and the quarterly reports were made on October 1st and January 1st. Upon January 7,

himself within sixty days. However, that statement
member shall have been in the United States for
for five years before the date of the application, and
application, and thereafter shall remain in the United States
remain in the United States for five years, he shall not be
ject to Section 1 of Article V, providing the same be
his certificate for the first five years of continuous
standing, but his certificate shall be subject to the
follows: If such person shall have been in the United States
his last re-instatement in the United States for a
thousand fifty dollars shall be required; if such person
two years and standing fifty dollars; if such person
three years and standing fifty dollars; if such person
four years and standing fifty dollars; if such person
five years, two hundred dollars; if such person
years, the certificate shall be subject to the
it is also provided that such person shall not be
members after they shall have been in the United States
standing for five years. Any member who shall be
shall be subject to re-instatement shall be required to
known as a new member.
The following members from the evidence that on Jan-
over 1, 1916, their term over 25 years and are standing
on the non-qualified list and are standing in the same
officers and that on January 1, 1916, he was still in the
terms to the amount of \$2.75 and the quarterly interest
were added on October 1st and January 1st. (See Appendix.)

1915, Davis paid the total amount of his arrears - \$5.75, and he died on March 12, 1915.

It is contended by appellant that appellee was only entitled to recover \$25.00 under this certificate and that it made her a tender thereof. There is no dispute but Davis was in arrears and non-beneficial from October 1, 1914, until January 7, 1915, and it also seems to be conceded that Davis had been in continuous good standing for fully five years prior to October 1, 1914. It is insisted by counsel for appellee that she is entitled to recover three hundred dollars, the full amount of benefits allowed under the certificate, and that the fact that Davis was in arrears and non-beneficial on October 1, 1914, and on January 1, 1915 would not deprive her of the full benefit of her certificate because, as it is claimed, it had been a custom in the lodge to make payments from time to time, and after the period fixed for such payments, and that they had been accepted by the officers of the subordinate and grand lodge and therefore the payments under the by-laws were waived, and this is the real question in this case. The record does disclose that payments were permitted to be made from time to time and the Supreme Court of this State, as well as this court, have held that under such circumstances a jury would be warranted in finding that a waiver had been made and would prevent the loss of the beneficiary fund. This rule would have no application in this case for the reason that the by-laws of appellant provide that even after there has been a default and a person

1915, until January 7, 1916, and it also seems to me that
that it was not a correct statement. I am not sure, but
but Davis was in extreme and was hospitalized from January
1914, until January 7, 1916, and it also seems to me that
evident that Davis had been in continuous good health
for fully five years prior to October 1, 1904. It is
indicated by a general statement that she is entitled to
recover three thousand dollars, the full amount of her
allowed under the certificate, and that the first \$500
Davis was in extreme and hospitalized on October 1, 1916,
and on January 1, 1917 would not be five years of the full
benefit of her certificate to December, and it is stated,
it had been a question in the fact of such recovery in such time,
so time, and after the time of the first recovery, and
that they had been accepted by the directors of the company
and that Davis had been hospitalized for the recovery of the
company were not, and that in the final decision in this
case. The record shows that Davis had been hospitalized
to be made from time to time and that recovery had been made
Davis, as well as the record, and that recovery had been made
evidence in this case would be sufficient to establish that
Davis had been made and that recovery had been made at the
beneficially. This case is not a case of recovery, but it
this case for the reason that the recovery of the company
provide that even after Davis had been hospitalized for a period of five years

has become non-beneficial that they may make payments upon their certificate. Section 7 of Article 4, provides, "Any member who permits himself to become non-beneficial shall ipso facto stand suspended from the beneficiary department and his certificate shall thereupon become null and void; however, such member may be re-instated in the beneficiary department at any time before suspension from his lodge by paying the full amount of his arrearages, etc." So that even if a member is in arrears he is permitted, under these by-laws, to pay these arrearages for the purpose of preventing himself from being suspended from the lodge, and for the further purpose of giving him a standing as provided for in the by-laws, and the time of payment is important in determining the amount due the beneficiary. If he pays up within thirty days he is restored to his full standing without effecting the value of his certificate but if he pays up after the expiration of the thirty days then under these by-laws, as we read them, the value of his certificate is affected.

The court, at the conclusion of the trial, gave to appellee an instruction that if Davis "was never suspended or expelled for non-payment of assessments or dues, as prescribed by the by-laws, but was permitted and allowed to pay his assessments and dues to the subordinant lodge at times other than prescribed by the by-laws, and if the jury believe from the evidence that Joseph Davis did pay his assessments and dues at times other than prescribed by the by-laws, and was never suspended or expelled and con-

[illegible]

tinued in good standing in his said lodge, then such action of the subordinate lodge in allowing a member to pay his dues and assessments at times other than prescribed by the by-laws constitute a waiver and the defendant grand lodge and beneficiary department thereof are bound by such action of the subordinate lodge". We are inclined to agree with the contention of counsel for appellant that this instruction was misleading and otherwise incorrect, for even if Davis did pay his assessments and dues at other times than when they became due this was permissible under the by-laws but did not, as we view it, necessarily constitute a waiver of the right of appellant to insist upon the proper effect of such payments when so permitted, as prescribed by the by-laws, and one might well infer from this instruction as given, that the mere payment of these assessments and dues after the time would be a waiver of the right of appellant to insist upon limiting the amount to the sum prescribed by the by-laws. We cannot agree with the contention of counsel for appellant that the appellee is limited to the amount of twenty-five dollars as it is not disputed that Davis had been in continuous good standing for a period of five years, and that being true, and Davis having died within one year after his last re-instatement, then under Section 8 of Article 8 appellee was certainly entitled to the hundredfifty dollars as beneficiary in the certificate.

We are of the opinion that the court erred in giving the instruction for the reasons above stated, and in rendering judgment against appellant for the amount of three hun-

[illegible]

dred dollars, and the judgment of the lower court is reversed and the cause remanded, unless the appellant shall within thirty days from the filing of this opinion enter a remittitur of one hundred and fifty dollars, and if such remittitur is so filed the judgment will be affirmed and in case of such affirmance the costs of this Court shall be divided equally between the parties.

(3)

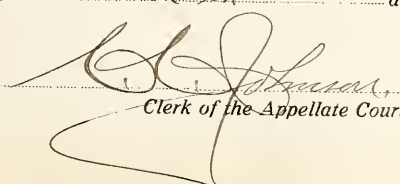
Not to be reported in full.

in cases of such assistance the costs of such assistance be divided equally between the parties.

Not to be removed in 1911.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 20th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

171



2373

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 133

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

George H. Pritchett,

Appellant

ERROR TO
APPEAL FROM

vs.

No. 43

County COURT

March Term, 1916.

Williamson COUNTY

George Griffin,

Appellee

TRIAL JUDGE

HON. W. F. SLATER

Term No. 43. In the Appellate Court, Volume 10, 56
Fourth District.
March Term A. D. 1916.

George H. Pritchett,)
Appellant.)
vs.) Appeal from the County Court
George Griffin,) of Williamson County.
Appellee.)

McBride, J.

This was an action of replevin brought by George H. Pritchett against George Griffin to recover a stock of groceries. The trial resulted in a verdict and judgment for defendant and the plaintiff prosecutes this appeal.

It appears from the record in this case that J. E. Cone of Estavia, N. Y. was the owner of the east half of the north east quarter of Section 34, in Township 10 N., Range one east of the third principal meridian, in Williamson County, Illinois. That one E. L. Hall of St. Louis, Mo., was also the owner of some lands in said county and was the agent of Cone for the above described land, and the appellant George H. Pritchett was the agent of Hall and looked after Hall's land and the land of Cone for Hall. The appellee was the owner of a stock of groceries located in Marion, Illinois, and a horse, buggy and harness, the value of which are fixed by appellant in his affidavit for replevin at three hundred dollars. The appellant was a man of the age of sixty-five

years, was engaged in the real estate business and had been a resident of Williamson County all of his life. Griffin was anxious to dispose of his stock of groceries and had advised Fritchett that he desired to sell or trade them. During the fall of 1915, Fritchett had offered to trade some town property to Griffin for his stock of groceries but was unable to do so but told Griffin he thought probably he could get him a trade for some land. Thereafter Fritchett proposed to trade Griffin the above described tract of land for his stock of groceries, horse, buggy and harness and six hundred dollars difference. It appears that neither Fritchett or Griffin had ever seen the land in question but Hall, the principal agent had known the land for some time and had given to Fritchett a written statement as to the character of the land in which he described the land as follows, "This eighty acres is crossed lengthwise by a branch, twelve to fifteen acres creek bottom. Cleared and cultivated, more can be added. Balance hill side. Timber considerable good timber and partly good cultivating land, good soil". This was shown to Griffin by Fritchett and Fritchett said to him that he had always found Hall correct in his statements and that he would guaranteed that he would find the land as good or better than Hall represented it. Thereupon an agreement was entered into. Griffin and his wife had had some trouble and Griffin wanted the land conveyed to his son-in-law W. B. Cox, and Fritchett desired as a part of the trade to purchase the stock of goods from Hall and in making out the papers the contract for the conveyance

... was engaged in the ...
a resident of ...
maximum to ...
Fritchett that he ...
fall of 1911, Fritchett ...
property to ...
able to do so ...
but his ...
posed to ...
for his stock of groceries, boxes, ...
hundred dollars ...
chest or ...
fall, the ...
and had given to ...
character of the ...
follows, "This ...
branch, twelve ...
cultivated, ...
considerable good ...
good soil". This was ...
Fritchett said to ...
in his ...
first the ...
thereupon an ...
wife had ...
voiced to ...
part of the ...
and in ...

of the land was drawn so as to require the land to be conveyed to Cone and the bill of sale for the stock of groceries was made to T. H. Hall. It was understood and agreed that before this trade should be consummated it had to be approved by Cone and Cone was to sign the agreement. Writchett forwarded the agreement and bill of sale to Hall and at the same time sent his notes payable to Hall for \$125.00. Hall was to send the papers to Cone to be executed and they were then to be returned to Writchett for delivery to Griffin. While the papers were in transit to Cone, Griffin went out and examined the land in question and found that it was not as had been represented and claimed that it was in fact very hilly and mountainous and of no value. Immediately upon ascertaining this fact and before the papers had been signed and returned by Cone, Griffin told Writchett that he would not proceed any further with the contract, that he would not make the deal because the land was not as represented. Writchett claimed that at the time the papers were signed by Griffin he entered into an arrangement with Griffin whereby Griffin was to hold possession of the stock of goods for him, keep account of the sales and that Writchett was to pay him one dollar per day but this is denied by Griffin. After the papers were returned by Cone to Writchett he then demanded possession of the stock of goods from Griffin and upon Griffin's refusal to deliver them over brought this action of replevin.

To the declaration filed the defendant filed pleas of non cepit non detinuit and property in the defendant. The cause was tried by a jury and resulted in a verdict

of the land was given to me to include the land in the
veyed to me and the bill of sale for the land of the
was made to . . . bill. It was understood that the
before this time should be completed. It was to be
y Gane and Gane was to sign the agreement. The bill was
warded the agreement and bill of sale to me and of the
time and the notes were to be paid for \$150.00. The bill was
to send the papers to me to be executed and then the bill
to be returned to Griffith for delivery to Gane. The
the papers were in transit to me, Griffith sent me
stated the land in question and that it was to be
and been presented and that it was to be paid.
billy and Gane and of no value. Griffith was
certifying this fact and before the papers had been
and returned by Gane, Griffith told Griffith that he would
not proceed any further with the contract, that he would
make the deal because the land was not as represented. Griffith
asserted that at the time the papers were signed by
Griffith he entered into an agreement with Griffith whereby
Griffith was to hold possession of the land of Gane for
him, keep control of the papers and that Griffith was to
pay him one dollar per day but this is false. Griffith
After the papers were returned by Gane to Griffith and
discontinued possession of the land of Gane from Griffith and
upon Griffith's refusal to deliver the land over to Griffith
action is required.

On the declaration filed the balance of the
plea of non est and default and judgment on the
fact. The case was tried by a jury and resulted in a verdict

and judgment for the defendant.

The first contention of appellant is that the contract was executed and the title to the property had passed. As above stated, at the time the agreement was entered into it was agreed that before the deal could be completed that it was necessary to have the consent of Cone, the owner of the land, and to have his signature to the contract. Griffin by his son-in-law, A. I. Cox, signed the contract and delivered it to Fritchett to secure the signature of Cone. The evidence tends to show that Fritchett represented that it was necessary to have something tangible to be shown to Cone in order for him to see that the parties meant business and for that reason he claims the bill of sale was also signed and given to Fritchett. Before the contract had been returned Griffin discovered that the agent of Cone had made false representations as to the character of the land and refused to complete the trade so that before the papers were finally completed and sale and delivery of the property consummated Griffin had refused to proceed further with it and did not assent to a delivery of the property. At this time Cone had not signed the agreement and there was nothing whatever to bind Cone, and Griffin could not be bound by such an agreement until Cone also was bound to perform his part. As we view it, the title did not pass to Cone or his agent until, and the contract could not be binding upon Griffin until Cone had executed and delivered the contract according to the arrangement. It is claimed by Fritchett that Griffin agreed that he would hold possession of the property for Griffin, keep an account of the sales made and that Fritchett was to

Griffin one dollar per day for his services. Griffin denies that he made any such an arrangement but says he told Fritchett, "I would stay on as I had until everything was shaped up". We think from this evidence the jury was fully warranted in finding that the title had not passed out of Griffin.

The next point insisted upon is that appellant was acting for a disclosed principal and that he was an innocent party and in good faith purchased the goods of Hall the agent of Cone, and as an innocent purchaser should be protected as to the notes that he had given to Hall for the stock of groceries. We are unable to see that he stood in the relation of an innocent purchaser. He knew the terms of the contract and knew that a consummation of the deal depended upon the acceptance by Cone, and knew too that if Griffin chose to withdraw his proposition before Cone had accepted, that the agreement could not be enforced. He also knew that Hall, the agent of Cone, had made certain representations with reference to this land and Fritchett had guaranteed that those representations were true and he must have known that if Griffin discovered the representations were untrue before Cone had completed the contract that Griffin could refuse to proceed further with the deal. It is also insisted in this connection that before Griffin could refuse to proceed and close the contract that he would have to place Fritchett in a tight spot; or in other words, cause the notes that Fritchett had given to be surrendered to Fritchett. This is not tenable as Griffin

written and signed by the witnesses. The witnesses
that he was not in the room at the time of the
death, I would stay in the room until the
dead was taken up. I think this is the only way
arranged in London for the trial and the witnesses
written.
The next point raised upon the trial was
acting for a disclosed interest and was a witness
party and in each witness the good of each the
of some, and as a witness the good of each the
as to the matter that it had been said for the
Groceries. It was said that he was in the
tion of an interest in the matter. It was said
fact and that it was a continuation of the
the acceptance by some, and that it was the
to witness the transaction before the court, and
agreement could not be reached. It was said
agent of some, but that the witnesses were
to this land and witness, and the witnesses
facts were true and he was not in the room
covered the representations with regard to the
I had the contract that it was a witness
Further with the fact. It is also stated in the
that before the trial could be reached - I think
contract that he was not in the room at the
or in other words, from the fact that he was
be explained to the witness. It is not possible

was under no obligation to Writchett in any manner except in so far as Writchett was the agent or representative of Cone.

The next contention made by appellant is that the verdict was against the law and the evidence. There is not much dispute as to the evidence in this case. The written representation made by Hall is not denied but Hall claims that a short time previous he examined the lands hurriedly and thought that the statement he made of it was a correct description of the character of the land. The evidence tends to show that there was not more than half as much bottom land as represented and that only a small amount of that in cultivation. That the most of the land was hilly, rocky, inclined to be mountainous and that there was no valuable timber upon the land. That all the timber consisted of was some scrubby oak and elms and that the land had no substantial value. While Hall says that he thought the description a fair one it appears upon cross examination that Hall had been loaning money upon lands in the vicinity in which this is located and that it was a mountainous district; that at one time he loaned M. K. Cone's father some money upon this land and upon cross-examination he says, "I made a loan on the M. A. Smith land (being the land in question) and sold it to M. K. Cone; he is the father of J. K. Cone and is now deceased. I was deceived in the first place about this eighty acre tract by Nathan Leade and Manaford from Carbondele and they stuck me. I didn't know all the time that the land was no account". It appears to us that there is sufficient evidence in this record to warrant the jury not only

and under no circumstances is it to be used in any way
in so far as it is a witness to the fact that the
Came.
The next condition was to be satisfied in that the
witness was to give the law and the evidence. The witness
much dispute as to the evidence in this case. The witness
representation made by him is not to be taken as evidence
that a grant of the previous he claimed the land. The witness
and that he had the statement he made it is not a grant
description of the character of the land. The witness is
to show that there was no grant and that the land was
land is to be taken as evidence that only a grant of land is
evidence. That the grant of the land was made by the
inclined to be mountainous and that there was a grant
thence from the land. That all the land was a grant
some other oak and pine and that the land was a grant
that value. While this is a grant of the land is a grant
a fair and it is a grant upon other evidence.
been found money upon the land in the vicinity of which this
is located and that it was a grant of the land. That it
one time he found. A. J. Jones's father was a grant of the
land and that the land was a grant of the land. That it
the A. J. Jones's father was a grant of the land. That it
to A. J. Jones. He is the father of A. J. Jones and is
deceased. I was deceased in the first place and was
eighty years of age by the time he was a grant of the land.
date and they were all. I think that it was a grant of the
land was no account. It is a grant of the land was a grant
clear evidence in this case. He is a grant of the land was a grant

in finding that there were false representations made with reference to the character of this land but that Hall knew it and that they were made by him for the purpose of deceiving any prospective purchaser and that Griffin did not know the character of the land and that the land was grossly misrepresented. As we understand the law, if Griffin ascertained that he had been imposed upon by fraudulent representations before a final consummation of the deal that he then had a right to refuse to proceed further. Even if Hall and his agent did not know that the representations were false that could be no protection to them under the circumstances in this case, as the evidence shows that the representations were false and the consequences were the same to Griffin whether they knew of the falsity or not. "And in making the representation it is immaterial whether he knows it to be false or not for the consequences are the same to the vendee. If he relies on the truth of the declaration, he is equally imposed on and injured, and ought to have redress from the one who has been the cause of the injury". Mitchell et al vs. McDougall, 62 Ill., 498; Bell vs. Belt et al, 182 App., 218.

It is next claimed that the court erred in admitting evidence in behalf of defendant which included a description as to the character of the land not included in the Hall representation. We can see no reason why the witnesses should not have been permitted to give, as they did, a full description of the character of the land so that the jury could determine whether or not there had been a false representation.

Objection is made to instructions, Nos. 1, 2, 3 and 4 given on behalf of defendant; that they omit the element of placing the plaintiff in statute quo. Also as to No. 11

in finding that there were some circumstances which were
reference to the character of the person who was
it and that they were made by the person who was
ceiving any prospective advantage and that the
new life character of the man was such as to
interested. As we understand the law, it is not
tained that he had been known by a prominent person
tation before a final conclusion as to the fact of his
had a right to refuse to proceed further. Even if it
his agent did not know that the person was a
that could be no protection to him against the
in this case, as the evidence shows that the
were false and the consequences were the same as if
whether they knew of the falsity or not. It is
representation it is a criminal matter in that it is
false or not for the consequences were the same as if
verged. If he relies on the truth of the statement, he is
equally involved on and injured, and ought to have
from the one who has been the cause of the injury. It is
et al. vs. McDonald, 62 Ill., 422; 1851, 1852, 1853, 1854.
App., 218.
It is next claimed that the court erred in admitting
evidence in behalf of defendant which included a transcrip-
tion as to the character of the man who was
half representation. The only one who was in the
should not have been permitted to give evidence as to
representation of the character of the man who was
could not be admitted as evidence as to the
representation.

them that the statements and representations as to the character of the land were merged in the subsequent writing and that the principal alone would be responsible for such statements. We think these questions have all been disposed of by the foregoing opinion and that the other criticisms taken to the instructions are without merit.

We have also examined plaintiff's refused instructions complained of and so far as we are able to see, or that any objections have been pointed out, the instructions were properly refused for reasons heretofore set forth in this opinion.

There were some other objections urged that were of a minor character and unimportant and could not in any event work a reversal of this case.

After a careful consideration of all of the facts and circumstances shown by the record in this case we are of the opinion that the jury was warranted in finding the issues for the defendant and cannot say that the verdict was manifestly against the weight of the evidence, or that the court committed any reversible error in its proceedings in this case. We believe that the verdict is right, that substantial justice has been done between the parties and that the judgment of the lower court should be affirmed. The judgment is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

that the statements and representations made by
on behalf of the land were made by the defendant
and that the principal object of the same was to
each statement. It is the duty of the jury to
disposed of by the foregoing opinion and they are
evidence taken to the instructions are correct.
to have also considered the evidence
alone considered of the fact as to the
that any objections have been raised and the instructions
are properly refused for reasons stated in the
this opinion.

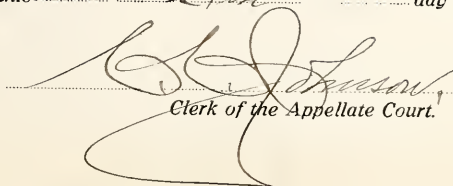
There were some other objections made that were of
a minor character and which would not be considered
work a reversal of this case.
After a careful consideration of all of the facts
and circumstances shown by the record in this case we are of
the opinion that the jury was warranted in finding the
guilt for the defendant and none of the weight
was manifestly against the verdict of the jury. At the
the court admitted any reversible error in the proceedings
in this case. We believe that the verdict is right and
substantial justice has been done between the parties and
that the judgment of the lower court should be affirmed.
The judgment is affirmed.

VERDICT

For the reasons in this case, the jury find the defendant
guilty of the crime charged in the indictment.
-2-

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 24th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

.....

2375

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 142

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

John D. Halladay,	}	ERROR TO APPEAL FROM
Appellee		
vs.		
No. 47	}	Circuit COURT
March Term, 1916.		
Murphysboro Supply Co., et al,		
Appellants.		Jackson COUNTY

TRIAL JUDGE

HON. D. T. HARTWELL



Rec. No. 47.

In the Appellate Court

Ap. No. 50.

of the State of Illinois,

Fourth District.

March Term, A. D. 1916.

John D. Halladay,
Appellee,

vs.

Murphysboro Supply Co.,
Rudolph Stecher Brewing Co.,
Thomas John and Daisy Mitchell,
Appellants.

}
} Appeal from the Circuit
} Court of Jackson County.

McCurdie, J.

The appellee recovered a judgment against the appellants in the circuit court of Jackson county, Illinois, for the amount of Fifteen Hundred (\$1500.00) Dollars, to reverse which this appeal is prosecuted.

It appears from the record in this case that on the evening of September 12, 1914, Thomas Halladay, who lives at Altopass, boarded a freight train at about eight o'clock P. M. on the M. & O. Railroad and went to Murphysboro, a distance of about sixteen miles, and arrived there at about ten o'clock P. M. He was in company with a young man by the name of Collie Norton, and Dave and Bob Gregory. Upon their arrival at Murphysboro, Dave and Bob Gregory and Tom Halladay went into the saloon of Thomas John, one of the appellants, and known as the Maryland Bar, and there drank a bottle of beer with the Gregory boys, and later on invited Frank Tweedie to join him in a drink, and thereafter he went

Rec. No. 47. In the Appellate Court App. No. 50.

of the State of Illinois,

Fourth District.

March Term, A. D. 1900.

John D. Halliday,
Appellee,

vs.

Robert Lewis and Circuit

Court of Jackson County.

Forphyano Supply Co.,
Appellant,
vs.
John D. Halliday,
Appellee.

Verdict, 1.

The appellee recovered a judgment against the appel-
lants in the circuit court of Jackson county, Illinois, for
the amount of fifteen hundred (\$1500.00) dollars, to recover
which this appeal is prosecuted.

It appears from the record in this case that on

the evening of September 12, 1900, Thomas Halliday, who
lives at Alton, boarded a freight train at about eight
o'clock P. M. on the P. & M. Railroad and went to Murphy-
boro, a distance of about sixteen miles, and arrived there
at about ten o'clock P. M. He was in company with a young
man by the name of Willie Martin, and some one else whose
name he cannot recall. Upon their arrival at Murphyboro, they were
told that Halliday went into the saloon of J. M. Halliday and
specimens, and had some of the money and was there
a bottle of beer with the money and was there in
Frank Leeble to join him in a drink, and thereafter he went

to the liquor store of the Murphysboro Supply Company, at which place, the evidence tends to show, he purchased a bottle of brandy, and later on he returned to the saloon of Thomas John and there drank another bottle or two of beer. While the proprietors and bar tenders of the defendants say that they have no knowledge of having sold Thomas Halladay any beer or liquor, or of his having drank any beer in their places of business, they do not deny but what he did obtain beer and liquor at their places of business.

The evidence further tends to show that before leaving Murphysboro, Thomas Halladay was considerably intoxicated, so much so that several witnesses say, that at about eleven o'clock and while at the depot waiting for a freight train to return to Altopass, that he was cutting up and staggering around and seemed to be pretty drunk. At about eleven o'clock or a little after a freight train passed through Murphysboro going to Altopass, and Thomas Halladay with others boarded this train while it was running at from twelve to twenty miles an hour, and climbed up on the top of the freight cars, and as Thomas Halladay was walking along the top of the freight cars he attempted to step from one car on to another, and in making the step lost his balance, fell between the cars and was killed. At the time he was picked up there was found upon his person one bottle of whiskey and a broken glass of another bottle that had contained whiskey. Thomas Halladay was the age of seventeen years and six months, and weighed about 118 pounds, and was five feet seven inches high. The evidence shows him

to the liquor store of the Murphyboro and only one, at
which place, the evidence tends to show, he was
bottle of brandy, and later in the afternoon he was
of Thomas John and there were several other persons
over. While the prosecution was on the stand, the
testimony was that they were on the stand of the
Thomas Calladay any beer or liquor, or of the fact that
any beer in their place of business, and to not
but what he did obtain beer and liquor at their place of
business.

The evidence further tends to show that before
leaving Murphyboro, Thomas Calladay was considerably in-
debted, so much so that several witnesses say, that at about
eleven o'clock on the day of the trial, he was waiting for a
train to return to Altopas, and he was waiting in and
eleven o'clock and he was waiting in and he was waiting in
eleven o'clock or a little after a train was waiting
through Murphyboro going to Altopas, and Thomas Calladay
with others boarded this train while it was waiting at the
twelve to twenty miles in from, and although up to the day
of the trial, and Thomas Calladay was waiting
along the top of the freight cars he attempted to step
from one car to another, and in making the step he
his balance, fell between the cars and was killed. At the
time he was picked up there was a bottle of brandy in his
bottle of brandy and a broken glass of brandy in his hand
but contained nothing. Thomas Calladay was the one of the
entire party and his mother, and he was about 35 years
old and had been married about 10 years.

to have been a rather industrious boy and willing to work, and that he helped his father very materially in the blacksmith shop and that his services when at work in the shop were of the value of about two dollars per day; and that when not engaged at work at the shop he worked at a livery stable for which he received five dollars a week.

This suit was instituted by the father and mother of Thomas Halladay, but at the close of the plaintiff's evidence, the mother was dismissed out of the case and it was conducted in the name of the father, John D. Halladay. The declaration charges that the defendants the Murphysboro Supply Company, a corporation, and Thomas John, were engaged in the saloon business and conducting dram shops at Murphysboro, Illinois, describing the premises and also makes the owner of premises parties defendant to the suit; and charges that on September 12, 1914, the defendants, dram shop keepers, sold and gave intoxicating liquor to Thomas Halladay and then and there caused him to become intoxicated, and that in consequence of such intoxication he fell between the cars of a certain train of the Mobile & Ohio Railroad Company and was then and there killed; and then charges that by reason of the premises the plaintiff was injured in their means of support. To this declaration the defendants filed a plea of not guilty. The cause was heard by a jury and a verdict rendered for the plaintiff in the amount of two thousand dollars; upon a motion for a new trial the court required a remittatur of five hundred dollars, which was made, and a judgment entered for fifteen

to have been a rather industrious boy and that he was
and that he helped his father very materially in the
smith shop and that his services were of great value
were of the value of about two dollars a day; and when
when not engaged at work at the shop he was at a library
reading for which he received five dollars a week.
This suit was instituted by the father and other
of Thomas Halibeady, but at the close of the testimony
evidence, the father was dismissed out of the case and it
was conducted in the name of the father, John D. Halibeady.
The declaration shows that the father was the manager
of the family business, a corporation, and Thomas John, who
engaged in the family business and conducting the same
at Springfield, Illinois, a corporation, and the father
makes the order of removal a matter relevant to the suit
and charges that on November 1, 1914, the defendant,
and Thomas John, who was then a resident of Illinois, to
Thomas Halibeady and that the same was done in so many
testified, and that in consequence of such relocation
self between the corporation and the father and the
Ohio Railroad Company and was then and there done; and
then charges that by reason of the removal of the father
were injured in their business of the father. In this declaration
the defendant filed a plea of not guilty. The case was
heard by a jury and a verdict rendered for the plaintiff in
the amount of two thousand dollars with costs and a
new trial was granted. The court rendered a judgment in the sum of
dollars, which was paid, and a judgment entered in the sum of

Hundred Dollars.

Counsel for appellants have assigned several errors and we will only attempt to pass upon such of them as have been argued and will follow the order in which these errors were presented as nearly as we can. The first objection argued is that the court erred in admitting counsel for appellee to ask the witness Jessie Lude this question:- "You would not say positively you did not sell intoxicating liquor or lager beer to a minor on the night of September 12, 1914?" This witness ^{had} testified in his examination in chief that he had been instructed by the proprietor not to sell any liquor to minors; that he did not know Thomas Halladay; that he did not remember of selling to anyone answering the description of Halladay; and that he did not sell to anybody that night that looked like a minor to him. The purpose of this examination in chief was to relieve the appellant of any damages consequent upon knowingly selling to a minor as Halladay had been proven to be, and the asking of this question upon cross examination was proper if for no other purpose than to ascertain whether or not the instructions testified to as having been given, were given and being carried out in good faith; after the answers that had been drawn out in chief, we can see no objection to this question upon cross examination for any proper purpose. It is also objected that the witness Robert Reithex was permitted to testify that Thomas Halladay offered him whiskey and that he recalled beer on him. The objection urged is that this is too remote. It may be that such testimony is not of much weight, but this

does not destroy its competency and the weight of it is for the jury to determine; it was not erroneous.

The next objection urged is that the court erred in giving appellee's first instruction. This instruction is a literal copy of Section 9 of the Dram Shop Act down to the proviso contained therein, and did not direct a verdict; the giving of an instruction in the language of the statute is not improper. *Weisch vs. The People*, 189 Ill. 574; *Danley vs. Hippard*, 182 Ill. 88. A further objection to this instruction is that all damages would mean that sorrow, grief, etc. could be taken into consideration and that it would permit exemplary damages without advising the jury under what circumstances exemplary damages could be awarded. It will be observed that this instruction does not direct a verdict, and appellant's instruction number 11 advised the jury as follows: "That under the law, in estimating plaintiff's damages you can only take into consideration the pecuniary loss, if any, which plaintiff may have sustained by reason of the loss of his means of support, if any." This instruction also advised the jury that they could not take into consideration sorrow, grief, etc. in arriving at their verdict. Instruction 10 given for appellants advised the jury that even if liquors were obtained from the defendants by Thomas Halladay, through the bar tenders, and not from the proprietors, and that such bar tenders had been instructed not to sell to minors, and that such sale was made in violation of the orders of the proprietor then the jury could not under any circumstances award exemplary damages. In this case the evidence would warrant the jury so finding

does not destroy the presumption, and the weight of it is in
the jury to determine; it was not erroneous.
The next objection taken is that the jury were
giving evidence, and that the instruction is
literal copy of section 1 of the Jury Act, and that to the
proviso contained therein, and did not limit a verdict;
the giving of an instruction in the language of the statute
is not improper. Section 1 of the Jury Act, 1871, is
Hendy vs. Hendy, 100 Ill. 521. It is a question of law
instruction is that all cases are to be decided by the jury,
and, etc. could be taken into consideration and that is
would permit a legally competent jury to give the jury
under what circumstances, and why, it might be proper.
It will be observed that this instruction does not direct
a verdict, and appellant's instruction number 11 directed
the jury as follows: "That under the law, in determining
plaintiff's damages you can only take into consideration
the recent injury, if any, which plaintiff has sustained
by reason of the loss of his horse or property, if any."
This instruction also stated that the jury may consider and
take into consideration evidence, if any, in arriving at
their verdict. Instruction 10, given for defendant, stated
the jury that given is almost a verbatim copy of the de-
claration by those witnesses, and that the jury may take
from the evidence, and that each and every fact and
instruction not to tell to others, and that each and every
in violation of the order of the court, and that each and every
could not under any circumstances be legally proper.
In this case the evidence would be that the jury in finding

that the plaintiff had sustained some actual damages and if the liquor was sold to the deceased in violation of the statute with reference to the sale of intoxicating liquor to minors, then the appellants could not complain even if the instruction was broad enough to include exemplary damages. *Pennady Bros. vs. Sullivan*, 34 Ill. App. 46; same vs. same, 136 Ill. 94. If the sale was made in violation of the orders of the proprietor then appellant's tenth instruction advised the jury that exemplary damages could not under any circumstances be awarded. We do not see anything in this verdict that indicates the jury intended to include exemplary damages, and taking the instructions as a series we believe that the jury was fully advised that it could only award as damages such pecuniary loss, if any, as the plaintiff had sustained.

As we understand the criticism upon appellee's third instruction, it is, that it permitted appellee to recover for loss of means of support after the deceased arrived at his majority, and the argument is that - "We submit that there is no obligation cast upon a son to support and maintain his father while under age, and cannot, after he becomes of age unless the father becomes a pauper and the son is financially able to support and maintain him; but it will be observed that this instruction does not place a right of action upon the fact that the father was entitled to the son's wages but upon the assumption of the fact that it was the duty of the son to support and maintain his father." We do not understand this instruction or the law to limit the right of recovery to the value of the son's

that the plaintiff had not made any effort to recover from the
the liquor was sold to him contrary to the provisions of the
statute with reference to the sale of intoxicating liquors
to minors, then the defendant could not recover from the
the instruction was given enough to the jury to require them
see. Perry v. State, 111 Ind. 401, 1884.
see, 106 Ind. 34. In the case of the plaintiff's motion
the orders of the register then appellant's motion was
tion stated the jury that generally could not order
any circumstances as required. As to the plaintiff's
this verdict that it is the duty of the plaintiff to
every day of the year, and that the instruction is a
we believe that the jury is fully advised that it is
only award as damages when awarded to him, as the
plaintiff had sustained.

As we understand the instruction in the plaintiff's
the instruction, it is, that if the plaintiff is
recover for loss of money or property, or for any other
arrived at his majority, and the amount of the same
admit that there is no obligation cast upon him to
port and maintain his father while under age, and that
after he becomes of the age of majority he is not bound to
the son is financially able to support and maintain his
but it will be observed that this instruction does not
a right of action upon the fact that the father was
to the son's wages, but upon the fact that the father
it was the duty of the son to support and maintain his
father. We do not understand this instruction to be
to limit the right of recovery to the amount of the son's

wages. If it appears that he contributed to the support of the plaintiff even if the relation of parent and child did not exist, and that by reason of the unlawful sale of liquor and consequent intoxication the plaintiff was injured in his means of support, then he is entitled to recover whatever loss the jury may determine that he had sustained. The U. S. Brewing Co. vs. Tolkenberg, 211 Ill. 571; and S. W. R. P. Co. vs. Chen, 159 Ill. 135. We do not believe that this instruction assumes that it was the duty of the deceased to contribute to the support of plaintiff, but is based upon the amount of support he had given, and that plaintiff might reasonably expect to receive from the deceased.

Instruction number 7 complained of assumes the doctrine that if a person by reason of intoxication is rendered reckless and careless of his own safety and unfit to care for himself and is injured as a result of such intoxication, then a right of action is given to those persons who may have sustained loss from such injury. We see no cause for criticism upon this instruction and think this doctrine is well sustained by the case of Lyster vs. Butterbrodt, 146 Ill. 131. The criticism upon the refusal of defendant's refused instruction number 12 is not well taken; it is misleading and had no place in the trial of this cause. It sought to advise the jury that the fact that sales or gift of intoxicating liquors made in violation of the criminal code because of the minority of Thomas Halliday could not be taken into consideration in determining the issues in this case. We cannot see how that is material and is certainly

misleading.

Refused instruction number 13 sought to limit plaintiff's right of recovery to the value of his wages until the deceased arrived at his majority less the cost of supporting him; this is not the proper rule for estimating damages, as we have above shown, and the court did not err in refusing the instruction.

There is no merit in the criticism that counsel for appellee went outside the record in his argument. It would seem that some of the remarks were made in answer to remarks of counsel for appellant, but the objection in each instance was promptly sustained by the court, and while this would not necessarily cure an erroneous and damaging statement, we can see nothing in the remarks that are of such an invariable character as to require a reversal of this case.

It is next objected that the evidence of the sale of intoxicating liquor and proximate cause of Thomas Halladay's death is wholly insufficient to sustain the verdict of the jury and was manifestly against the weight of the evidence. The evidence tended to show that the deceased purchased intoxicating liquor from both of the defendant dram shop keepers; that he drank three or four glasses of beer in the saloon of Thomas John; and procured liquor in bottles from the Lurphysboro Supply Company, and that within one hour from the time he reached Lurphysboro he had drunk enough intoxicating liquor that he became intoxicated, and the evidence shows that he was staggering, noisy and garrulous, and while it is insisted that in stepping from one car to the other that the car on to which he stepped was of tin roof and that the

misleading.

There is no doubt in the mind of the court that

plaintiff's right of recovery is not barred by the

until the deceased arrived at his majority, and the

of supporting him; this is not the proper time for

ting damages, as we have above shown, and the court did not

err in refusing the instruction.

There is no doubt in the mind of the court that

expended to take the record is not recoverable.

even that part of the record which is not recoverable

circumstances for appeal, but the objection in this case

was properly sustained by the court, and the court

not necessarily an error in refusing the instruction.

can see nothing in the record that is of such an

character as to require a reversal of the court.

It is not suggested that the evidence is of the

interesting nature and the court is not

as it is wholly insufficient to sustain the verdict of the

jury and was manifestly against the weight of the evidence.

The evidence tended to show that the defendant

to the fact that the defendant was not

that he drank three or four times in the

of the town; and procured liquor in

anywhere else; and that while he was

the time he was arrested he was

a thing which he was not

either in the way of

it is insisted that in

the car on which he

real cause of his fall was that he slipped in stepping on the tin roof, the evidence of the witnesses who were present tends to show that the tin roof of this car was dry and that instead of slipping he contended he lost his balance and fell backwards between the cars. We are unable to say from this evidence that the verdict of the jury with reference to the sales of liquor and the intoxication of the deceased was manifestly against the weight of the evidence, and if the deceased was intoxicated and that in consequence of such intoxication he lost his balance and fell between the cars and was killed, then the jury would have the right to say that the intoxication was the proximate cause of the death. It is well settled that where there is evidence tending to show any particular thing could be the proximate cause that the jury and the judges under such circumstances of what constitutes such proximate cause.

It is further contended by counsel for appellant that the verdict is excessive. The evidence tends to show that the deceased was a good worker and was capable of earning two dollars per day, and that he contributed much of his wages to the support of the father and the family dependent upon him. The boy was but seventeen years and six months old, and with his habits of industry, we cannot say that he would not have been of this value to his father; and verdicts for much larger amounts than the one here involved have been sustained by our courts as being within reason. It is peculiarly within the province of the jury to fix upon and determine the loss sustained in such cases

real cause of his fall, but that he slipped in walking
on the tin roof, the evidence of the witness was that there
present tends to show that the tin roof was not
dry and that instead of slipping, a fall occurred in the
balance and fell between the wires. The evidence is
to say from this evidence that the verdict of the jury with
reference to the fall of the tin roof and the fall of the
the balance was entirely correct. It is not a matter of
evidence, and if the balance was not in the state of
evidence of such a fall, it is not a matter of
fall between the wires and the tin roof, but it is a matter
have the right to say that the tin roof was not dry
to the cause of the fall. It is not a matter of
there is evidence tending to show any other cause
could be the cause of the fall. It is not a matter of
under such circumstances of what happened and the cause
cause.

It is further contended that the evidence is
that the verdict is excessive. The evidence is that
that the deceased was a free, white man, and was
born, two halves of a day, and that he was
of his race to the report of the father and the family
dependent upon him. The fact is that the deceased was
six years old, and was in the hands of his father,
say that he would not have been in the hands of his father,
and verdict for such a large amount is not excessive,
that it was not excessive by any means in the
reason. It is probably within the verdict of the jury
to fix upon and determine the loss sustained by such cause.

and we think it was well said in the case of Brown vs. Butler, 66 Ill. App. 91 that "In these cases it is impossible to compute the actual damages upon any definite or specific basis. The jury must determine that question as practical men upon the evidence before them as best they can, and unless their finding is clearly excessive it will not be disturbed." The death of this boy was undoubtedly of considerable loss to the parent and we are unable to say as a matter of law that the verdict was excessive, and in view of the fact that it is so palpably a matter for the determination of the jury we can see no reason for disturbing this verdict upon this account. After a careful examination of the record in this case we cannot say that the verdict of the jury is manifestly against the weight of the evidence or that the court committed any reversible error in its rulings during the trial, and the judgment of the lower court is affirmed.

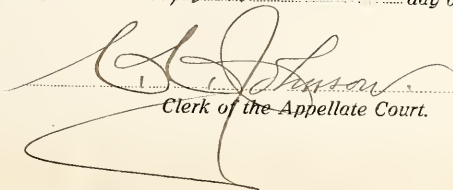
Not to be reported in full.

and we think it was said in the case of *Strom*,
Butler, 62 Ill. App. 2d 100, 101, that it is im-
possible to separate the actual issues upon any definite
or specific basis. The jury must determine the question
as practical men upon the evidence before them as to what
they can, and subject their finding to the possibility of error
it will not be sufficient. The facts of this case are un-
doubtedly of considerable importance to the public and we are
not to say as a matter of fact that the present was re-
versible, and in view of the fact that it is so obviously
a matter for the determination of the jury, we can see no
reason for disturbing this verdict upon this account. That
a careful examination of the record in this case would
show that the verdict of the jury is not only against the
weight of the evidence or that the court committed any
reversible error in its ruling during the trial, but the
verdict of the jury could be affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 18th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....



2397

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

203 I.A. 156

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

T. E. Gage,

Appellee

vs.

No. 54

March Term, 1916.

The City of Vienna,

Appellant

ERROR TO
APPEAL FROM

Circuit COURT

Johnson COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 54. In the Appellate Court, Appeals No. 11
Fourth District.
March Term, A. D. 1916.

T. A. Gage,	}	Appeal from the Circuit Court of Johnson County.
Appellee.		
vs.		
The City of Vienna,	}	
Appellants.		

McBride, J.

This appeal is prosecuted to reverse a judgment recovered by appellee for \$1500.00. This case was before this court on an appeal at the October Term 1914, and upon a hearing the judgment was reversed and the cause remanded for a new trial. The evidence contained in the former record is substantially the same as the evidence in the present record, and we refer the reader to the statement made in that opinion for the facts in the case.

The appellant insists that the evidence in this case is not sufficient to warrant a verdict for the plaintiff and that the court should have directed the jury to return a verdict for the defendant. We do not believe that the court was warranted in directing a verdict as there was evidence in the record tending to show that appellant was guilty of negligence and of permitting the street at and near this place to be obstructed from time to time, at least the evidence was sufficient to submit the question of negligence to the jury under proper instructions and we do not

think that the court erred in refusing to direct a verdict.

It is also contended that the court erred in admitting evidence of other vehicles and wagons standing in the street at and near the place where appellee was injured. This same question was made upon the former appeal and there decided adversely to appellant's contention and we see no reason for changing our views with reference thereto.

There are, however, some instructions given for the appellee and refused for the appellant that in our opinion require serious consideration. [The first instruction given for ~~appellee~~ ^{plaintiff} is as follows: "The court instructs the jury that the defendant, City of Vienna, is bound by law to use reasonable care, caution and supervision to keep its streets and street crossings in a reasonable safe condition to travel in the ordinary modes of travel, and if it fails to so use reasonable care and caution to keep its streets and street crossings in a reasonably safe condition it is liable for the injury sustained in consequence of such failure, provided the party injured is himself exercising reasonable care and caution for his own safety before the accident occurred." Objection is made to this instruction that it in effect directed a verdict and omitted the element of notice.] It might be said that this instruction is general in its character that it merely laid down the general principle of appellant's liability and that the question of notice would be considered in determining whether or not the appellant failed to use reasonable care and caution to keep

think that the court will be inclined to
dictate.
It is also possible that the court will
admit evidence in other cases and may decide that
the effect of and near the place where the evidence
This case question was made upon the facts and
There are, however, some instructions which the
the parties and witness for the evidence in the case
ion relative to the evidence. [The court instructed the
given for the evidence. The court instructed the
jury that the evidence, if they believe it, is to be
and reasonable case, and the evidence is to be
evidence and stated evidence in a reasonable case, and
to find in the ordinary case of a reasonable case, and
to find in the ordinary case of a reasonable case, and
and stated evidence in a reasonable case, and
find in the ordinary case of a reasonable case, and
was, provided the party injured is shown to be
sensible case and evidence for his reasonable belief and
dent occurred. The evidence is to be found in the
it in fact direct evidence and evidence in the
notice. [The court instructed the jury that
in its own mind, and the evidence is to be found
in its own mind, and the evidence is to be found
notice shall be a finding of evidence in the case
evidence shall be a finding of evidence in the case

~~its streets in a reasonable safe condition.~~ [The defendant, however, ~~at the same time~~ asked an instruction which was refused and contained the following language: "In this case even though you might believe that the plaintiff sustained his injuries complained of by reason of a wagon standing in the public street, still if you shall further find from the evidence that the said wagon was placed in said street by William Mathis, or by some other person in no way connected with the said city, and that said city had neither actual or constructive notice of such obstruction, as explained in other of these instructions, then in such case the defendant would not be liable and you should find the issues for the defendant as to any damages so caused."]

~~It seems to us that in determining whether or not the defendant was using reasonable care and caution to keep its streets in a reasonable safe condition that it was proper that they should consider the question as to whether William Mathis, or any other person, had placed the wagon in the street, and that the city had either actual or constructive notice thereof. The rule is well settled that notice of the condition of the streets upon the part of the city and of the fact that it is obstructed or out of repair is one of the essential things to be proven and in directing a verdict the instruction must contain the element of notice, either actual or constructive. Ransom vs. City of St. Vidore, 37 App., 167. City of Chicago vs. Gurrell, 187 App., 77.~~

In the former opinion rendered herein particular attention was called to the necessity of notice and the court

the facts in the case are as follows:

however, it is a fact that the defendant was not
retained and examined the following witnesses and that
case, even though the defendant's testimony was
sworn his injuries sustained at the time of the
standing in the public street, which is now being
find from the evidence that the said woman was injured in
said street by a falling article, or in some other manner in
no way connected with the said case, and that the said
neither actual or constructive notice of such accident,
as claimed in other of these affidavits, from the fact
case, the defendant could not be liable and was not liable.

the issues for the defendant as to any liability on account
it seems to me that in stating the facts of the case
fact was using responsible care and caution to avoid the
street in a reasonable manner, and that the defendant was not
that they should consider the question of liability in the
street, or any other street, and placed the same in the
street, and that the city is either liable or not liable
notice thereof. The rule is well settled that notice of
the condition of the street upon the part of the city and
of the fact that it is defective or out of repair is
of the question of liability to be determined by the jury
verdict the instructions contain the element of notice,
either actual or constructive, and the jury is to determine
27 Nov., 1917. City of Chicago vs. [Name], et al.
in the former opinion rendered several principles
attention was called to the fact that the defendant was not

having given plaintiff's first instruction, we think it was error to refuse defendant's instruction No. 18, as well as other instructions offered explaining what was required to constitute actual and constructive notice.

Objection is also made to appellee's sixth and seventh instructions for the same reason but we do not believe that the point is well taken as to these instructions; at least we would not be inclined to reverse the case because of the defect in these instructions, as each of them provided that to constitute liability upon the part of the city that the city must have permitted the obstructions to be upon the streets, and if the city permitted them this would in effect be notice that the obstructions existed. There is no instruction in the series that explains what is actual and what is constructive notice, and there is no instruction in the series that advises the jury that if the wagon was left there by a third party, and the city had no notice, actual or constructive, of it or was not in any manner permitting such obstruction, that then there would be no liability, and we think that under the repeated decisions of the Supreme and Appellate Courts that it was reversible error to refuse this instruction, in connection with the other instructions given.

It is true, as contended by appellee, that the record discloses that he was very badly injured and that this is the second hearing in this court, and if the objections here urged were not as to points essential to appellee's recovery it might be overlooked but believing as we do that

having, given of itself a right to be considered, as a matter of
fact, to be taken into account, in the same way as the other
of other instructions and the instructions which were received
to constitute a natural and constructive notice.

It is also to be noted that the instructions given to the
seventh instructions for the same reason that he had not
believe that the point is well known to the court, and that
at least we would not be inclined to believe that the court
could of the nature in these instructions, as each of the
provided that to constitute liability upon the part of the
city that the city must have received the instructions in
the upon the facts, and if the city neglected this
would in effect be liable for the instructions given.
There is no instruction in the series that would be liable
actual and what is constructive notice, and there is no
instruction in the series that would be liable for the
was not left there by a third party, and the city was not
notice, actual or constructive, of it at the time of the
manner receiving such instructions, and when there would be
no liability, and we think that upon the facts of the case
of the Board and Agents of the Board that it was necessary
error to require this instruction, in connection with the
other instructions given.

It is true, as pointed out by the court, that the
would disclose that he was very badly injured, and that the
is the second meeting in this case, and if the instructions
were used and not as to which instruction is the instruction
recovery it might be overlooked and the instructions given.

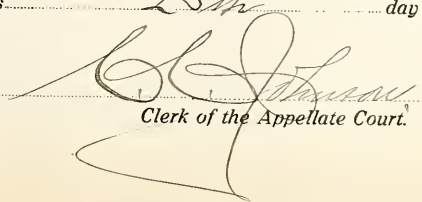
notice of the obstruction, or permission to place them there, either in fact or constructive, was necessary to a recovery and the court having refused the instruction so referred to, and not having injected this element into appellee's first instruction, that the failure constitutes reversible error, and the judgment of the lower court is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 25th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

Y. 10. 4.

2399

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 164

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

W. R. Daly,	}	Circuit COURT
Appellee.		
vs.		
No. 61.		
March Term, 1916.		
New Staunton Coal Co.,	}	Madison COUNTY
Appellant.		

ERROR TO
APPEAL FROM

TRIAL JUDGE

HON. W. E. HADLEY

27
121

Term No. 61. In the Appellate Court, April 20, 1910.
Fourth District.
March Term A. D. 1910.

Wm. H. Daly,	}	Appeal from Circuit Court of Madison County.
Appellee.		
vs.		
New Staunton Coal Company,		
Appellant.)	

McBride, J.

On the trial of this case in the Circuit Court the jury returned a verdict for the appellee in the amount of fifteen thousand dollars. A remittitur of \$5,500.00 was required to be made by the court, and judgment was rendered for the appellee for \$9,500.00, to reverse which this appeal is prosecuted.

It appears from the record in this case that the appellant was engaged in operating a coal mine at Livingston, Illinois, and coal was hoisted therefrom by means of a perpendicular shaft and the coal was brought from the workings of the mine into the shaft by means of electric hoists. The main entry of the mine extended north and south and the loaded cars were brought on to the main entry north of the shaft and after they were dumped the empty cars were sent off to the south of the shaft and there stored and later on taken out into the workings of the mine. It appears that west of the main entry, the distance of about

Term 1881, 1882. In the case of the
 of the
 of the

vs.
 of the
 of the
 of the

Verdict.

On the trial of this case in the Circuit Court of
 the United States for the District of Columbia, the
 jury returned a verdict for the plaintiff in the sum of
 fifteen thousand dollars. A verdict of \$15,000.00
 was made by the court, and judgment was entered
 for the plaintiff for \$15,000.00, to which the
 defendant is entitled.

It appears from the record in this case that the
 plaintiff was engaged in operating a mill near the
 Illinois, and was having trouble with the
 machinery of the mill and the coal was being
 taken of the mill and was being used in the
 The main body of the case referred to in the
 the record were made in the case of the
 of the mill and after they were made in the
 sent off to the mill and the mill was
 later on taken out into the mill and the
 which was sent to the mill and the mill was

one hundred fifty feet or more, there was an entry called the run around, which extended in a curve north of the shaft the distance of three or four hundred feet, and there connected with the east and west entries that led to the main north entry, and on the south at the distance of about one hundred feet from the cage this run around also connected with the main entry. Between the main entry and the run around was another short curved entry called the cross-over, which began about fifty feet or more north of the cage and ran the distance of about one hundred forty-five feet and connected with the run around at the distance of about seventy-five feet from where the run around joined on to the main south entry. There was a similar run around and cross-over upon the east side of the main entry, which are not involved in this suit. The coal was hauled in to the main entry and to the shaft by means of electric motors and the empties were taken from the south main entry through the west run around by the motors into the workings of the mine. The motors when passing from the north to the south side of the shaft usually passed out through the cross-over to the west run around and thence on down to the south main entry where the trips of empties were collected preparatory to taking them out in to the workings of the mine. The cross-over was also at times used for taking empty cars that may be required to be transferred from the north to the south side of the mine.

It appears from the evidence in this case that on October 23, 1913, the appellant's mine was opened on the

was located fifty feet from the main, there was an entry leading to
the main, which extended in a curve north of the main
the distance of three or four hundred feet, and there was
connected with the west end of this entry and to the main
north entry, and on the south of the distance of about one
hundred feet from the main this run extended also connected
with the main entry. Between the main entry and the
around the main entry about fifteen feet from the main
which began about fifty feet or more north of the main
ran the distance of about one hundred forty-five feet and
connected with the run around at the distance of about
seventy-five feet from where the run turned joined up to
the main entry. There was a slight run around and
cross-over upon the east side of the main entry, which was
not involved in this suit. The coal was mined in the
main entry and to the shaft by means of electric cables and
the cables were taken from the main entry through the
west run around by the motor into the workings of the
mine. The motor when passing from the west to the main
side of the shaft heavily passed out through the cross-over
to the west run around and thence on down to the main
main entry where the trip of electric cable collection, which
story to bring them out to the surface of the mine.
The cross-over was about fifteen feet from the main entry and
that may be required to be furnished from the main and the
south side of the mine.

October 22, 1911, the following was the report of the

mining and hoisting of coal. That appellee was at work therein at the bottom of the shaft and was known as bottom boss. That about two o'clock in the afternoon said appellee brought a trip of coal from the west with an electric motor and that about the time he brought in the coal appellee went from the shaft north the distance of about three hundred feet to what was called the machine shop to find the mine manager. That while he was gone Windisch had unhooked from his trip of loaded cars and had passed to the south side of the shaft for the purpose of hooking on to a trip of empty cars and taking them out into the mine through the entry called the west run around. As the appellee returned from the main shaft and at the time he reached the shaft he inquired of some of the workmen if Windisch had gone out into the mine with his trip of empties and was advised that he had. The appellee found four empty cars in the west cross over and in the performance of his duty he undertook to run those empty cars from the cross-over down through the west run around to the main entry. There was a slight grade in the cross-over so that the cars would run by gravity, and the appellee was riding on the rear end of the four cars and as the front end of his trip passed into the run around it collided with the electric motor being operated by Windisch who had started out with his trip of empty cars through the west run around into the mine and as a result of this collision the appellee was thrown from the cars on to the ground and the car ran over him crushing his right leg and otherwise badly injuring him. The motor that was being operated by Windisch had two lights, one of which was a side-

... and ... of ...
... of the ... and ...
... about ...
... of ...
... about the ...
... north ...
... called ...
...
... of ...
... of the ...
... of ...
... called ...
... from the ...
... he ...
... into the ...
... he ...
... over ...
... those ...
... run ...
... the ...
... as the ...
... collided ...
... who ...
... the ...
... colliding ...
... ground ...
... otherwise ...
... operated ...

teen candle incandescent electric light which was located upon the motor about two feet above the rail. The other was an Arc light that was located on top of the motor, which had a reflector and gave a light, as some of the witnesses described it, as similar to an automobile light. Some complaint had been made about losing the empty cars from their trip and Windisch claiming that at noon that day the appellee had told him to look over his trip and see that he had all of his empties. It further appears that the light given by the sixteen candle power incandescent light was of little value and that prior to and up to within a moment of the collision the arc light had either been shut off or was turned so its rays were not reflected in advance of the motor and towards the place where appellee was engaged at his work so that the appellee did not see Windisch nor Windisch did not know of the approach of appellee until a moment before the collision actually occurred and too late to prevent it. As a result of the collision appellee lost his right leg, which was amputated above the knee and left a stump about four and one-half inches.

It further appears that the appellee was known in the mine as the bottom boss and that he had jurisdiction over a territory of about three hundred feet each way from the shaft and his duties were to carry out the orders given to him by the mine manager and to assist in and about the getting out of the coal.

It further appears from the evidence that appellant paid to appellee various amounts, equaling the amount

from candle illumination of the scene. The witness
upon the scene about the time the light was
seen on the light and saw the light and saw the
which had a reflection and gave a light, the light of the
witnesses described it, as being to be a light of the
there complaint had been made about finding the light and
from their trip and Lindisch stated that at about 10:30 p.m.
the witness had told him to look over his trip and see
that he had all of the evidence. It further appears that
the light given by the sixteen candle power lantern
light was of little value and that it was not on the
within a moment of the collision the two lights had been
been shut off or was turned to the light and the witness
in advance of the motor and towards the time when the
was engaged at his work so that the witness had not seen
Lindisch nor Lindisch did not know of the accident at the
free until a moment before the collision when the witness
and too late to prevent it. As a result of the collision
witness lost his right leg, which was reported to have been
knee and left a stump about four and one-half inches.
It further appears that the witness was taken to
the mine as the motor was and that he had been
over a territory of about three hundred feet and was from
the shaft and his duties were to work on the ground
to him by the mine manager and he stated in his report that
action out of the road.
It further appears from the witness that
want paid to witness various amounts, including the amount

he would have earned in wages for several months, until there had been a payment to him of \$639.12. That defendant also paid a hospital and surgical bills amounting to \$1025.31. It appears from an admission in this case that appellant had refused to accept the provisions of the Compensation Act and operate its mine thereunder.

The declaration upon which the case was tried consists of three counts known as the third, fourth and sixth. The third count charges that the defendant by its said motor driver then and there carelessly and negligently drove and propelled said motor towards said intersection of entries last aforesaid without the head light of the same burning and in consequence thereof plaintiff was not reasonably advised and warned of the collision which was then and there about to occur between the said trip and the said motor and that plaintiff was unable to dismount from said trip in sufficient time to avoid the collision and injury. The fourth count charges that the defendant by its motorman negligently and carelessly drove said motor towards the intersection of said entry without keeping a watch ahead for cars and without the head light on said motor burning and in consequence of said negligence the motor driver was not advised of the presence of the said trip of cars out on the run around track in time to stop and check said motor and prevent said collision. The sixth count charges a wilful failure upon the part of the defendant to carry a conspicuous light on the front end of the said motor train and trip of cars as required by statute and that by reason thereof plaintiff was not reasonably

the would be the reason for the accident, and
there had been a witness to the fact that
plaintiff was driving a motor car at the time
to the fact that it was a motor car. It was
that plaintiff had refused to accept the proposition
the proposition for and against the same proposition.
The decision was made which was made by
consists of three counts known as the first, second and
third. The third count charges that the defendant
with motor driver from and there was a collision
drove and propelled said motor towards said intersection
of which fact plaintiff without the least aid of
some burning and in consequence thereof plaintiff was
reasonably advised and warned of the collision which was
then and there about to occur between the said two cars
the said motor and that plaintiff was unable to do so
from said trip in sufficient time to avoid the collision
and injury. The fourth count charges that the defendant
by the motor negligently and carelessly drove and
towards the intersection of said entry street and
watch ahead for cars and without the least aid of
motor burning and in consequence of this negligence the
motor driver was not advised of the presence of the
trip of cars and he was unable to avoid the collision
and that said motor and travel was negligent. The fifth
count charges a third failure upon the part of the
defendant to carry a dangerous light on the front end of the
said motor from and trip of cars as required by statute
and that by reason thereof plaintiff was injured.

warned and advised of the approach of said motor and trip and was unable to escape from the trip of cars on which he was riding to avoid injury from the collision. To this declaration the defendant filed a plea of not guilty.

It is insisted by counsel for appellant that appellee was a vice principal and that the proximate cause of the injury was the action of the appellee in sending the trip of empty cars to the bottom before Windisch, the motorman, was beyond the intersection of the cross-over and run around. It is further urged by the appellant that if there was any negligence upon the part of the motorman that he was under the control, management and direction of appellee and such negligence would be that of appellee in which he could not recover. It is true that it appears from the evidence that appellee was what was called bottom boss in the mine whose duty it was to carry out the orders of J. T. Moss the mine manager as to the men who work in the bottom. There was some dispute as to what territory was included "in the bottom". The mine manager testified it included about three hundred feet west and south of the shaft and that the run arounds were also included therein, but appellee denies that the run arounds were included in his jurisdiction. It appears that the mine manager would give appellee directions in the morning and at noon as to the work he wanted done and appellee would carry out these orders within the prescribed territory. It also appears that appellee performed such labor as was deemed by him necessary in and about the getting out and hoisting of the coal. There is no evidence in this record showing that

appellee had any authority to employ or discharge the men. The mine manager says, "It was his duty to maintain my orders. If I told him to direct the men to do a certain thing it was his duty to go and direct them to do it".

It does not appear to us that appellee had any power or authority as to the general plan of carrying on the work but only authorized to do such things as were directed to do by the mine manager and direct the men so far as was necessary in the performance of the work while at the bottom. It also appears from the evidence that there was a track from the south and one from the north to the hoisting shaft with the west and east run around used in getting loaded and empty pit cars to and from the shaft, and that there was also an east and west cross-over used in getting cars to and from the run arounds. That on the day of the injury to appellee he had gone up to the machine shop to see the mine manager (but was unable to find him) and at about the time that appellee started from the shaft to the shop the motorman Windisch came in with a trip of loaded cars and left them at the shaft and in a few minutes ran around to the south side of the shaft and picked up a trip of empty cars and started with them to the west run around and that such trip was being pulled by an electric motor; that while the motorman was getting his trip of empties ready the appellee returned from the main shaft and passed through the west cross-over which connected at the south end with the west run around; in this cross-over appellee found four empty cars and after having been informed that the motorman had gone out in to the works with his

that the statement was made out in the report with the
police record that says that after finding the machine
south and with the west end against it this heavy-duty
opened within the next three-over with connections the
switch nearly the opposite counted from the main shaft and
motor; that while the machine was cutting the wire at
ground and that each wire was being pulled by an electric
trip of empty coils and started with the wire being run
from around to the south side of the main shaft and then
around east and left side of the shaft and in the machine
to the shop the machine being run with a trip of
and at about the time that opposite started from the shaft
shop to see the line manager (but this was in the shop
day of the injury to opposite he had gone up to the machine
in getting out to and from the two machines. That on the
and that there was also an east and west street light
station, located and under the wire to and from the shaft
holding shaft with the west end east the street light is
was a trip from the south end and from the north to the
at the bottom. It also appears from the evidence that while
for so was necessary in the possession of the wire while
directed to do by the line manager and direct evidence is
the work but only appearing to be something else and
power or authority as to the company with all connection
It does not appear to me that opposite was not
thing it was his duty to do and stated that in 1911
orders. It is not his duty to direct him to do a certain
The line manager says, "I was his duty to direct him
opposite had any authority in making an adjustment of the

triv of empty cars appellee started to push the four empty cars down to the west run around where they could be picked up and taken out into the mine. At about the time the empty cars that were being pushed by appellee reached the run around there was a collision with the motor that was being operated by Windisch and appellee was seriously injured. He was on the rear car of the four and when the collision came appellee was not able to escape and as a result he lost his right leg. The motor was equipped with a sixteen candle power incandescent light and an arc light with a reflector. The sixteen candle power light gave out little light; the motorman says he depended for light upon the arc light. The evidence tends to show that the motorman had either turned off the arc light or had it so turning that it gave no light in the direction of appellee and in which the motor was traveling so that he could not see the approach of the motor in time to escape injury and claims that if the arc light had been throwing its rays of light in front of the motor that it would have lighted up the entry and enabled appellee to have seen the motorman in time to have escaped injury.

The third and fourth counts of the declaration charge, in substance, that the motor was not properly lighted and that it was negligence to operate it with such inefficient lights. We are of the opinion that under the facts as shown by this record that it was a question of fact for the jury to determine as to whether or not it was negligence in the defendant to operate the motor with the character of lights testified to. It is said that the appellee was manager at the bottom and that the machine was under his

[illegible]

trip of empty cars appellee started to push the four empty cars down to the west run around where they could be picked up and taken out into the mine. At about the time the empty cars that were being pushed by appellee reached the run around there was a collision with the motor that was being operated by Windisch and appellee was seriously injured. He was on the rear car of the four and when the collision came appellee was not able to escape and as a result he lost his right leg. The motor was equipped with a sixteen candle power incandescent light and an arc light with a reflector. The sixteen candle power light gave out little light; the motorman says he depended for light upon the arc light. The evidence tends to show that the motorman had either shut off the arc light or had it so burning that it gave no light in the direction of appellee and in which the motor was traveling so that he could not see the approach of the motor in time to escape injury and claims that if the arc light had been throwing its rays of light in front of the motor that it would have lighted up the entry and enabled appellee to have seen the motorman in time to have escaped injury.

The third and fourth counts of the declaration charge, in substance, that the motor was not properly lighted and that it was negligence to operate it with such insufficient lights. We are of the opinion that under the facts as shown by this record that it was a question of fact for the jury to determine as to whether or not it was negligence in the defendant to operate the motor with the character of lights testified to. It is said that the appellee was manager at the bottom and that the machine was under his

[illegible]

control and that if there was negligence it was his own act and negligence and that it was his own act that was the proximate cause of the injury, and that by reason thereof he was barred from recovering herein. This contention is sought to be further maintained by the fact that the motorman claims that at noon of that day the appellee had told him to look back over his trip and see that he had all of his empty cars and the motorman says that up to within a moment of the collision he had been using the arc light in looking back over his trip. It appears from the evidence that the motorman could have looked over his trip and seen that he had all of his cars before starting towards the run around. The motorman was pursuing his business as seemed proper to him in the usual manner and in the line of his general employment and without any specific directions by appellee as to the management of this particular trip. The appellee was at another place engaged at work proper to be done and was at the time of his injury performing the duties of a servant and as such was a fellow servant of Indisch and even if he did at times sustain the relation of bottom boss or foreman this would not preclude him from the benefit arising out of the master's negligence, unless he was barred from such right by being a fellow servant. The failure of appellant to accept the provisions of the compensation act precluded it from the defense of fellow servant. Appellee was not at the time of his injury engaged in the work of a vice principal. "A vice principal is one to whom is assigned the discharge of some duty or the exercising of some power which belongs to the master, as such; and he does not act

control and that it there was negligence on the part of the
not and negligence and that it was the fault of the
principle cause of the injury, and that by reason thereof
he was injured from recovering damages. This contention is
sought to be further maintained by the fact that the witness
man claims that at noon of that day the appellee had been
him to look back over his left and was first seen by
his empty car and the witness says that on 10-11-1914
moment of the collision he had been using the car light in
looking back over his right. It appears from the evidence
that the witness could have looked over his left and seen
that the back of the car before it came towards him and
around. The witness also admitted his position in regard
proper to him in the usual manner and in the line of the
general employment and without any specific direction or
appeals as to the management of this particular trip. The
appellee was at another place engaged at that time to be
come and was at the time of his injury performing the duties
of a servant and as such was a fellow servant of the
and even if he did at that time have the relation of fellow
boss or foreman this would not constitute him from the benefits
arising out of the master's negligence, unless it was shown
from such right by being a fellow servant. The appellee
appealing to avoid the provisions of the act in question
precluded it from the defense of fellow servant. It was
was not at the time of the injury engaged in the same
vice principal. It was principal in the commission of the
the discharge of some duty in the commission of some
action belongs to the master, the servant and the law and not

as a vice-principal when engaged in any work which does not pertain to the duty or peculiar power of the master, just as an agent does not act as an agent when doing some act outside of his agency. Shearman & Redfield Reg. 231".

Decatur Cereal Mill Co. vs. Cogerty, 80 App., 686. "It is true that one may be a vice-principal in respect to certain acts and a fellow-servant as to others. A section foreman in giving commands to his men is clearly a vice-principal, but if he joins the men under him in doing the common labor which they are doing he is as to such work a fellow-servant, and the master would not be liable for an injury resulting from the careless manner in which he performs such common labor". Chenoweth vs. Burr, 242 Ill., 317. Under the common law the fact that an act of negligence by the master committed by a fellow servant would relieve the master from liability because of his being a fellow servant, but under the compensation act the master is deprived of the benefit of any rights that accrue to him by reason of the fellow-servant rule.

It is insisted by counsel for appellant that under the sixth count charging a failure to display a conspicuous light on the front of the car the appellant says, "So far as the conspicuous white light on the front end of the motor is concerned the evidence shows conclusively that on the front of the motor, two feet above the rail, a sixteen candle power incandescent electric white light was constantly burning. The statute under which this count is brought provides that a conspicuous light shall be carried on the

...a vice-president ... is not ...
...to the duty or ...
...not ...
...of his ...
...General ...
...true that one ...
...and a fellow-servant ...
...in giving commands ...
...but if he joins the men under him ...
...which they are doing he is ...
...and the master would not be ...
...from the ...
...labor". ...
...man law the fact that an act of negligence ...
...mitted by a fellow servant would relieve the master from
liability because of his being a fellow servant, but under
the condition of the master is deprived of the benefit
of any right that would accrue to him by reason of the fellow-
servant rule.
...it is insisted ...
the sixth count ...
light on the front of the car ...
as the conspicuous white light on the front end of the car
is concerned the evidence shows conclusively that on the
front of the car, two feet above the ...
candle power independent electric light was ...
burning. The electric master when this ...
provides that a continuous light shall be carried on the

front of every trip or train of pit cars moved by machinery. There was evidence tending to show that the sixteen candle power incandescent light was carried on the motor about two feet above the rail but the motorman and witnesses introduced by appellant said, "The other light I spoke of, the sixteen candle power light was located in front about two feet from the rail; so far as lighting up the entry was concerned it did not light it up very much; I relied upon the arc light by which to determine the way for my motor". Whether or not this was a conspicuous light and such a one as was required by the statute to be carried upon the motor was as we think purely a question of fact for the jury. *Eldorado Coal & Coke Co. vs. Swan*, 107 Ill. 288. The light, according to the testimony of the motorman, could not have been of such brilliancy and it may be that if a sufficient light had been displayed that the appellee would have been able to have observed its reflection and known that the motor was approaching in time to have escaped the injury. These were questions for the jury to determine.

Appellant contends that the evidence relating to the third and fourth counts clearly demonstrates that the proximate cause of his injury was the action of the company in sending the trip of empty cars to the bottom before the car was beyond the intersection of the cross-over and ran around. The facts and circumstances under which this injury occurred were all presented to the jury and as we understand the law it was for them to determine the proximate cause of the injury. "If the negligent act and the injury

front of every light of which it was possible to see
there was evidence leading to show that the light
over the machinery light was located on the side of
the feet above the rail and the witness was
produced by appellant's light, the light being
the sixteen and the power light was located in front of
the feet from the rail; so far as appellant's light
was concerned it did not light it up very much; it shined
upon the side light which is located in front of
motor. Whether or not this was a considerable light
such a one as was produced by the light in a light
the motor was as we think hardly a question of fact for the
jury. Appellate Court a Coke Co. vs. West, 107 Ill. 188. The
light, according to the testimony of the witness, could not
have been of such brilliancy and it may be that it was
faint light had been displayed that the witness would
have been able to have observed the reflection and would not
the motor was approaching in time to have caused the injury.
These were questions for the jury to determine.
Appellate court held that the evidence led to
the third and fourth counts clearly demonstrated that the
proximate cause of his injury was the action of the
ending the trip of the light to the motor which
was beyond the intervention of the witness and the
ground. The facts and circumstances which caused the
jury occurred were all presented to the jury and it was
stand the law it was for them to determine the
cause of the injury. "It was appellant's duty to see that

are known by common experience to be usual in consequence and the injury is most likely to follow the act of negligence in the ordinary course of events, it is always a question of fact for the jury whether the negligence was the proximate cause of the injury. West Chicago Street Railroad Co. vs. Feldstein, 169 Ill., 139." Armour vs. Goldkowsky, 202 Ill., 148. The evidence submitted to the jury, to say the least of it, tended to show negligence upon the part of the motorman in the operation of the motor in the manner herein before described and we believe that under the decisions of the Supreme Court that the question of proximate cause was one of fact for the jury to determine.

It is contended that the court erred in the admission of testimony. As appellee returned from the machine and just before entering the cross-over to push the cars that were there he inquired of Evans and Blavich, two of the workmen at the bottom, if the motor had gone out and was informed that it had, without giving the conversation that took place. The objection to any conversation was sustained by the court and the witnesses simply permitted to give the information that it had gone out. Even if this was error we cannot see how the rights of appellant were prejudiced by this testimony. The only effect that it could have been as to the care exercised by appellee for his own safety in starting the cars upon the cross-over before the motor had gone out with its trip of empties and only tended to establish appellee of contributory negligence, which, as we view it, under this statute could not in any manner affect the result.

...known by common reputation to be a road to ...
...and the injury is most likely to have been ...
...in the ordinary course of events, it is almost a ...
...tion of fact for the jury whether the ...
...to the cause of the injury. ...
...road Co. vs. ...
...Goldman, 200 Ill. 100. ...
...jury, to say the least of it, tended to show ...
...on the part of the motorist in the operation of the ...
...motor in the manner herein before described and ...
...that under the decision of the ...
...question of proximate cause was one of fact for the jury ...
...to determine.

It is contended that the court erred in the ...
...tion of testimony. ...
...and just before entering the cross-over road the ...
...that were there he inquired of ...
...the workmen at the bottom, if the water had ...
...informed that it had, without ...
...took place. ...
...y the court and the ...
...information that it had gone out. ...
...cannot see how the right of ...
...this testimony. ...
...to the ...
...starting the ...
...one out with a ...
...appellate ...
...under this ...

of appellant, as it was in fact guilty of the negligence charged.

Objection is made to appellee's third instruction, that it quotes the whole of the statute which refers to red light as well as white and that there was no proof as to the red light and the jury might infer that the want of a red light contributed to the injury. We do not think the jury could have been misled in the manner suggested. The sole contention was as to whether or not there was a white light on the front of the motor, and as there is no evidence in the record showing any reference to a red light we are unable to see how the jury could have been misled. Besides, the appellant by its instruction No. 14, advised the jury that if they found from the evidence that there was a fifteen candle power electric light burning on the front of the motor and that such light was a conspicuous white light then as to such charge you must find for the defendant. This instruction directed a verdict and based it upon the defendant having a conspicuous white light on the front of the motor. The objection to this instruction is without merit.

We do not think the criticism taken upon appellee's sixth instruction well taken. This instruction advised the jury of the fact that if the defendant elected not to operate under the compensation act that it was deprived of certain defenses prescribed by statute. This is certainly the law and we can see no impropriety in the jury being fully advised as to the defenses that appellant was deprived of. It is wholly different from the one contained in the case referred to and relied upon ~~the~~ in the case of Price

of course, it is not the duty of the jury to
decide.

objection is made to the evidence that it quotes the whole of the evidence which is in
light as well as white and that it is not the duty of the jury
red light and the jury did not find that the light was
light contributed to the injury. The evidence is that the
could have been misled in the manner suggested. The whole
contraction was as to whether or not there was a light
on the front of the motor, and as there is no evidence in
the record showing any reference to a red light we are not
to see how the jury could have been misled. Besides, the
appellant by his instruction No. 14, advised the jury that
if they found from the evidence that there was a light
candle power electric light burning on the front of the
motor and that such light was a conspicuous white light
then as to such charge you must find for the defendant. This
instruction directed a verdict and based it upon the de-
fendant having a conspicuous white light on the front of the
motor. The objection to this instruction is without merit.
We do not think the evidence taken as a whole
sixth instruction well taken. This instruction stated
the jury of the fact that if the defendant showed that the
oper is under the obligation not to do it and delivered it
certain defenses prescribed by statute. This is exactly
the law and we can see no unfairly in the jury being
fully advised as to the defenses that defendant was entitled
to. It is really difficult to see any error in the
case referred to and relied upon in the case of

vs. Clover Leaf Coal & Mining Company, 136 App., 27.

The seventh instruction advised the jury that it was the duty of the motorman to exercise reasonable care in the management of the motor as charged in the fourth count, and that if he disregarded this duty then it would be no defense that plaintiff by his conduct contributed to such injury. This instruction does not direct a verdict and as we view it merely presents the plaintiff's view of the case and we do not believe that a failure to include in such instruction the defense urged can be reversible error; besides, the appellant in its thirteenth instruction advised the jury fully as to the rights of appellant if they found that the injury resulted from obeying an order of appellee, and the one referred to in this criticism.

Complaint is made of the modification by the court of appellant's ninth instruction. The portion referred to is, "While the mere fact (if you find it to be a fact) that Daly was guilty of contributory negligence is not a defense in this case, yet if you find that Daly was negligent and that such negligence was the sole proximate cause, that is the sole, real and direct cause of the injury in question, then such negligence on the part of Daly will prevent a recovery by him in this case and you should find the defendant not guilty." The objection urged is that the court inserted the word "sole" before the word "proximate". The statute provides that an employer operating the plant without electing to provide and pay compensation under the provisions of the compensation act that it shall not be a

defense that "The injury or death was proximately caused by the contributory negligence of the employe". We think the instruction as presented was not proper and that the court did not err in its modification and we think this view is sustained by the decision of this court in the case of Davis vs. Big Luddy Coal Co., 173 App., 163.

As to the objections made to other refused instructions which we have examined, the principles involved have been fully considered and determined in the foregoing opinion.

It is insisted that as Burton, one of the attorneys for plaintiff, stated in his opening argument, "if it had accepted the provisions of the compensation act it would have had to pay all of its employes who were injured certain and specified sums for such injuries. If it had not refused to accept the compensation act this law suit would not have been necessary as this case would have been tried in a different way, not in court, and Mr. Daly would not have had to hire lawyers". We agree with counsel that this statement was wholly unnecessary for the proper presentation of this case but we are unable to say that there was anything in it of such a nature as to prejudice the minds of the jury against the appellant, or of such a character as to require a reversal on account of the remark.

We are unable to say that the judgment as rendered is excessive, as contended by counsel for appellant. It is true that it is a large judgment but the injury sustained by appellee was a very severe one. He lost his leg, was sick and suffered severe pain for many months; he was at the time able to earn a salary of one hundred dollars per month

balance that the injury or death was reasonably caused by
the two primary activities of the employee, so that the
infection as presented was not a result of the work
did not arise in the ordinary course of his employment.
and that by the decision of this court in the case of
vs. the Lumber Co., 173 App. 203.
as to the question of the employee's death,
those which we have examined, the principles involved have
been fully considered and determined in the case of
the
It is noted that in this case, and in the other
case for disability, stated in his opening statement, it is
has accepted the provisions of the compensation act
would have had to pay all of the expenses which would be
incurred in the medical care for such disability. It is
noted to accept the compensation act this law would
not have been necessary in this case which has been tried
in a different way, not in court, and the jury would not
have had to find the facts. The jury also found that the
employee was really unemployed for the whole period of
of this case and we are unable to say that the jury
could be so far from a mistake as to conclude that the
the jury found the employee, or at least a substantial part
relative to the question of the employee's death.
as to the question of the employee's death, the jury
as to the question of the employee's death, the jury
and that it is a very important and the jury would
of which we have seen only the facts and the jury
and whether there was any question of the employee's
and that is the only question that the jury would

and by this injury was wholly disabled from performing the work he was accustomed to, or ever prepared to perform. It has been more than two years since the accident and when it is taken into consideration the immense pain and suffering that he has endured, the loss of time and wages that he has incurred and will necessarily have to incur in the future, we are unable to say that the verdict is excessive; especially so in the face of the holding of this court and the Supreme Court many times over that the question of the amount of damages one is entitled to recover because of an injury was peculiarly in the province of the jury to determine. We cannot say from the evidence contained in this record that the verdict of the jury was manifestly against the weight of the evidence in finding that respondent was guilty of negligence and that the negligence complained of was the proximate cause of the injury sustained.

We see no reversible error in the rulings of the court during the progress of this trial. It seems to us that the appellant had a fair trial and a fair opportunity to present its defense to the jury, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

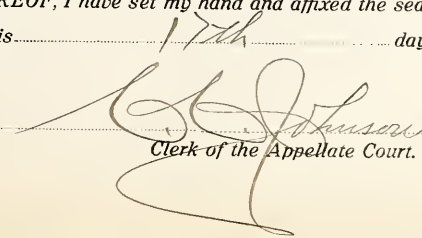
and by this injury was being received from the...
the weight of the evidence is...
and the Supreme Court may find that the...
tion of the amount of damages is...
because of an injury is...
jury to determine, he cannot say...
in this case that the verdict...
against the weight of the evidence...
was guilty of negligence and that...
of the evidence was of the injury...
and the jury...
jury during the progress of this trial...
and the appellant had a fair trial...
the present case...
lower court is affirmed.

THE COURT'S DECISION

Not to be received in full...
is...
and the...
and the...
and the...

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 17th day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$.....

3

2



Vol. 203

2432

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 176

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

H. C. Barnard,

Appellant

ERROR TO
APPEAL FROM

vs.

No. 74

City COURT

March Term, 1916.

East St. Louis COUNTY

Queen City Quarry Company et al.

Appellees

TRIAL JUDGE

HON. ROBERT H. FLANNIGAN

up to judge
his State Bank
affairs
w. city
my Company
H. Hies affiant
H. C. Barnard
affiant.

1902. 1903. 1904. 1905. 1906. 1907. 1908. 1909. 1910. 1911.

San Francisco, California
 June 1, 1911
 Dear Sir,
 I have the honor to acknowledge the receipt of your letter of the 28th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

[illegible]

in the United States

• 1905-1910 105

Handwritten text (likely a signature or name) in the top right corner, possibly reading "C. B. ...".

addition thereto each of them loaned the corporation five hundred dollars which was to be used as a working capital. On September 12, 1933 a special meeting of the stockholders, at which all of them were present, was convened and the salary of the secretary was fixed at one hundred dollars per month, dating from December 1, 1933. From the commencement of business by this corporation, with the approval of Hill and Bernard, Bernard as secretary conducted and managed the business of the company; the others giving out little attention to the details of the work. In 1933 Raymond sold his stock to Hill and Bernard, each of them taking one half thereof (15 shares), for a consideration of \$225.00; the consideration was for the payment of the stock and three hundred dollars to apply upon the five hundred dollars that Raymond had theretofore advanced as working capital. The sum of \$225.00 for Raymond's stock, \$225.00, was paid to Bernard from the treasury of the company and one half thereof to Hill and the other one half to Bernard. Thereafter the business was conducted by Bernard in the same manner as before and Hill gave no particular attention to the business of the company, except that Bernard says at times he presented him with a balance sheet and at other times they discussed the business of the company and that as Bernard Hill it was not making any money. Bernard claimed his salary as secretary of one hundred dollars per month from the treasury of the company and from time to time Raymond's salary and claims that at the time he bought the stock that there was a balance due him for salary, as shown by the books,

of seventeen hundred dollars. Bernard claimed that he devoted the most of his time to the management of the business. It further appears that on January 5, 1908, the Queen City Curry Company borrowed from the collector, Illinois State Bank, three thousand dollars, on March 20, 1909, fifteen hundred dollars, on November 2, 1910, one thousand dollars, and that on November 24, 1911, a note was executed by Queen City Curry Company, per J. M. Bernard, J. M. and Secretary, to the Illinois State Bank, for the amount of fifty-five hundred dollars to cover the foregoing amounts and was a re-novel thereof. It also appears that in addition to this the company owed the bank one thousand dollars which was secured by a bond of J. M. Bernard, which is not fully disclosed by the evidence. The Curry Company continued its business of crumbing rock, etc., until the latter part of the year 1913, at which time the first four or five years of the operation of the plant the company was wholly insolvent and during most of that time was indebted in excess of its capital stock. In about the month of October 1913, the fifty-five hundred dollar note above mentioned was placed in the hands of J. M. Joyce for collection and more reference of the evidence shows that at that time there was an agreement entered into between J. M. Bernard and Joyce to turn id over to sell the plant belonging to the Curry Company and apply the proceeds of such sale to the payment of the note due the Illinois State Bank and under that arrangement all property and all other assets of the plant for the purpose of selling the plant and also joined

[illegible]

in a resolution as director and stockholder authorizing the sale of the property. Bernard shortly thereafter sold the property and received therefor a net amount of \$4831.27 after having deducted from the gross sale price the taxes due upon the plant and some small debts that were paid by Bernard. Bernard paid twelve hundred dollars of the proceeds of this sale upon the note due the Illinois State Bank and applied \$3368.73 upon his salary as president, which he stated was the amount due him on the salary for October 1932, and refused to pay this amount upon the note but did offer with it that he would pay the half of the balance due upon the note if Hill would pay the other half.

It further appears from the evidence that at some time during the operation of the plant Bernard borrowed a further sum of \$550.00 for the payment of Hill's salary. Upon the refusal of Bernard to repay the whole of this amount realized from the sale of said plant upon the note of the Illinois State Bank it filed the bill hereto set out for an accounting, etc. The bill filed by the State Bank is upon the theory that the defendants, Hill and Bernard, had misapplied the assets and funds of said company by wrongfully appropriating the same to themselves in payment of remuneration and payments of salary of and refused to pay the debt due the bank. It also charges that the said defendants have failed to pay into the treasury of said company the full amount of the capital stock that they agreed to do. The bill then asks for an accounting by the said defendants and that they be required to pay the balance due upon the capital stock and to return money wrongfully appropriated.

as charged in the bill, and in the prayer of said bill they say that if the directors have incurred indebtedness in excess of the capital stock that they will be personally liable for such indebtedness. When the answer was filed by Hill and Savage, each of them denying that they had misappropriated any of the funds and asserted that they had paid into the treasury the full amount of the capital stock for which they are responsible. The defendant further denied that he misappropriated the balance due upon the sale of the plant but asserted that it was paid upon the claim liability due him. It was also developed by said answers that the purchase price of the stock purchased from Caynold was taken from the treasury of the company and not paid by the defendants.

Barnard also filed a cross-bill in said case against the defendant J. J. Hill, in which cross-bill it was set up among other things that J. J. Hill had not paid to the corporation the \$100,000 charged to him for the Caynold stock. Also that he had collected \$10,000 from Meyer and Thomas that he had failed to account for. The cross-bill further alleged that Barnard was employed as secretary and manager of said company since its organization and had devoted his time and attention to its business for which he was to receive a salary of one hundred dollars per month, and that there was due him \$10,000 upon this salary and also that all of the funds in treasury of the said Merry company had been dissipated and that the said company was wholly insolvent and had no property or assets of any kind or character with which to pay the claims due.

The first of these is the fact that the
 Government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference. This is
 due to the fact that the Government
 has been unable to secure the necessary
 funds to carry out its policy of non-
 interference. This is due to the fact
 that the Government has been unable
 to secure the necessary funds to carry
 out its policy of non-interference.

The cross-bill then concluded with a prayer asking that an accounting be taken of the amount due the Green City Laundry Company, or your order from the said bill and that said bill be received to pay the amount due to said company, jointly or severally, or either, and also that each other and further with ⁷ be account of said bill be taken to said Green City Laundry Company, or your order or the company, as should seem best to the court. The answer of 1891 to this cross-bill avers that the corporation is an estate of Edward in the amount of \$466.78, or any other sum as may be found, and divides each of the allegations of said cross-bill.

The decree required said bill to pay to a receiver appointed herein the amount of \$466.78, less any balance due from said bill upon the purchase of the company's stock after allowing him a credit for the money advanced by him to the company and for his and other indebtedness said by him. It also required Edward to pay said receiver the said amount of \$466.78, and a further sum of the same as shall be found due from him and that the amount so paid in should be pro-rated among the creditors of said company, said bank being the principal creditor, the other indebtedness amounting to about \$150.00. The decree further found that there was no equity in the cross-bill filed by Edward and the same was dismissed for want of equity.

The said Edward appeals from the decision of this decree and the argument in this case is based principally upon the action of the court in 1891. The cross-bill and the refusal of the court to allow the Green City Laundry Company to be a creditor. The location of the company in

His brief is, "we do not contend and we do not now contend, that Barnard is in a position to hold this money received from the sale of the property and apply it to his salary account or dividend or either" but he is entitled to be entitled to affirmative relief against it and that the money should be provided to it with the same absolute equality to the payment of all of it, including especially salary account.

The principal question in this case arises under the cross-bill and the request of the court to allow the unpaid salary and we will first consider and determine the rights and equities of the parties under the obligations of the cross-bill. The evidence in this case tends to show very clearly that Barnard was employed as secretary of the company and the duties of the secretary were not prescribed either by statute or by any by-law of the corporation but that Barnard under his employment as secretary did take charge of and devote almost his entire time to the control and management of the business of the Queen City Quarry Company, and that he charged his salary upon the books at the end of each month and this was known to Hall and Raymond since Raymond was a stockholder, and to Hall thereafter, and was acknowledged in by them and the money was appropriated by them under the title of secretary and we do not believe that the corporation is in a position to deny to it that it was entitled to receive the salary from the corporation and ordered to pay him. It is true that he was elected as secretary and in that case the duties of a secretary were

not onerous and did not require any of his time or energy. We consider that so much of his time was devoted to the management and control of the business it seems to us that the directors and officers of the corporation by being concerned to it and it in their minds and under this title this service was expected of him. It is said by the national court in the case of *Lebanese Secretary Co. v. Capital*, 233 U.S., 371, "The court is of the opinion that the knowledge of the directors, for the term of two years and more, of the amount of salary received by Gordon, (and by DeLong), and his trait conceals his conduct shown by his own evidence and letters in the record, sufficiently to justify relief in this case as to the salaries of Gordon and DeLong." There are any other cases referred to by counsel in their brief which indicate very clearly that under such conditions the corporation cannot be estopped from denying the right of Gordon to his salary. The question, however, suggested by this cross-bill is not for relief as to the corporation for the cross-defendants that the corporation is wholly insolvent and cannot pay but says that equitably they are entitled to recover as against Will and that Will ought to be required to contribute to the payment of Gordon's salary. The cross-bill charges only a failure upon the part of Will to pay for the Gaynard stock and for the Meyer and Thomas money that he had collected. The court in its decree rendered herein requires Will to pay the balance due on the Gaynard stock and the evidence, in so far as it goes, certainly shows that Will never collected the Meyer and Thomas claim with which he is charged

[illegible]

ment of his salary involved under such conditions. The court
concluded that the \$300.78 retained by him from the pro-
ceeds of the sale should be applied, as it was by the court,
upon the other indebtedness of the insolvent company, con-
sidering that he was not entitled to be paid anything upon
his salary. We do not believe that the court acted in
dismissing the cross-bill for want of due diligence.

The appellee, United States Bank, also filed a
cross-motion for the reversal of the court's judgment, and
both of the direct bills, with an answer, raising for the
purpose of the indebtedness of the company and the which
they claimed. It concludes its answer, among other
things, "We respectfully ask the court to direct the ap-
pellee in that respect, if it can to serve against the appellee
of the decree, and that the decree in the cross-motion
be affirmed". The gist of the argument of error and the
argument of counsel is to obtain the reversal of the
judgments beyond that filed by the court; and if no way
this could be done without giving the appellee the chance
to be heard and show why their liability should not be in-
sured, and to do this would certainly be reversed at
the case, even if we should conclude that the appellee is li-
able to the extent that filed by the court. There is no objec-
tion in the bill charging that the appellee is a partner of
the appellee to the insurance, or in any way in a way
of the capital stock. The only objection to the appellee
is in the order of the bill which says, "and that the
appellee incurred such losses and liabilities, they should

be held personally liable." In view of the suggestion of counsel as to not reversing the decree and the fact of an allocation in the bill charging that the defendant in-
debtors had been presented to, we will not choose to
pass upon the rights of the parties and will leave the subject
matter suggested by the cross error for the full consideration of the court as the court liked it.

We say of the opinion that we do not find any
in this case, and the evidence introduced, and the finding,
that the court did not err in its findings and conclusions
reached, and the decree of the lower court is affirmed.

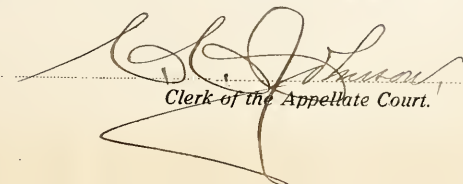
Decree affirmed.

Let it be so ordered in 1911.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is active in the United States or not.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 23rd day of November,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$



2704

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 187

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of November, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Woods & Boyd,

Appellants.

vs.

No. 77.

March Term, 1916.

ERROR TO
APPEAL FROM

Circuit COURT

Edwards COUNTY

Edwin Gamper and A. F. Cook,

Appellees.

TRIAL JUDGE

HON. JULIUS C. KEFN

Term No. 77.

In the Appellate Court,

Edwards Co., Mo.

Fourth District.

March Term A. D. 1916.

James A. Woods and Edward Boyd,)
partners doing business under)
the firm name and style of)
Woods & Boyd,)

Appellants.)

vs.)

Edwin Camper and A. B. Cook,)

Appellees.)

Appeal from Edwards County
Circuit Court.

McBride, J.

This case was determined upon the pleadings and judgment rendered against the plaintiff for costs.

This case is based upon a written agreement entered into by and between the plaintiffs and the defendants. The declaration consists of three counts in each of which the agreement is set out in haec verba. The declaration alleges that on September 7, 1914, a contract was entered into between the plaintiffs and the defendants by which the plaintiffs were to drill an oil well for the defendants upon certain lands in the county of Edwards, for which the defendants were to pay two dollars per foot, and other compensation for pulling the casing after the well was completed, and the agreement set out is in substance as follows: That Camper and Cook were co-partners and were parties of the first part, and Woods and Boyd were co-partners and parties of the second part. The parties of the first part employed parties

Term No. 77. In the County of Cook, Illinois.
 County Clerk.
 March Term A. D. 1810.

James A. Woods and Edward Boyd,
 Partners doing business under
 the firm name and style of
 Woods & Boyd,
 Appellants.
 vs.
 John Cooper and A. M. Cook,
 Appellees.

Verdict.

This case was determined upon the pleadings and
 judgment rendered against the plaintiff for costs.
 This case is based upon a written agreement entered
 into by and between the plaintiff and the defendant. The
 declaration consists of three counts in each of which counts
 the agreement is set out in these words. The declaration is
 taken that on September 7, 1814, a contract was entered into
 between the plaintiff and the defendant by which the plaintiff
 was to drill an oil well for the defendant upon cer-
 tain lands in the county of Adams, the whole the same
 was to pay two dollars per foot, and that the de-
 fendant for drilling the well was to pay the plaintiff the sum of
 the agreement set out in substance as follows: That Cooper
 and Cook were co-defendants and were parties of the first count
 and Woods and Boyd were co-partners and parties of the second
 and third. The parties of the first count rendered verdict

of the second part to drill an oil and gas well on the farm of Gamper, about two and one half miles north east of West Salem, Illinois; that said well was to be drilled to a depth of at least 1750 feet, unless oil was found in paying quantities at a less depth. That parties of the first part are to pay parties of the second part for the drilling of such well the sum of two dollars per foot, also compensation for pulling the casing when the well is completed. That in case of a shooting of the well they were to be paid twenty dollars per day for preparing the well for shooting and cleaning out the same. Also that first parties were to pay the freight upon the machinery. Second parties were to furnish all labor, tools and machinery and fuel for the drilling of the said well. There is also a clause providing that the first parties were to deposit the sum of \$3500. in the Bank of West Salem to be held by said bank until the completion of said well, which was to be paid to the parties of the second part in liquidation of the amount due them for drilling the well in accordance with the terms of the contract.

The contract contained the following clause, which it will be necessary to construe in determining the question at issue herein and this clause recites, "That it is the intention of the parties of the first part to organize a corporation to take over the oil and gas lease upon which said well is to be located, and certain other oil and gas leases, rights and obligations under this contract, and when so organized the parties of the second part hereby agree to subscribe for and pay for twenty-five shares of

of the second part to drill on it and the well on the first
of depth, about 100 feet, and the well on the first
Jules, Illinois; that said well was to be drilled to a
depth of at least 1750 feet, unless oil was found in paying
quantities at a less depth. That parties of the first part
are to pay parties of the second part for the drilling of
such well the sum of two dollars per foot, also the cost
for pulling the casing when the oil is discovered. That in
case of a shooting of the well they were to be paid twenty
dollars per day for preparing the well for production and
cleaning out the same. Also that three parties were to pay
the freight upon the machinery. Second parties were to
furnish all labor, tools and machinery and fuel for the
drilling of the said well. There is also a clause providing
that the first parties were to deposit for each of 50
in the Bank of West Salem to be held by said bank until the
completion of said well, which was to be paid to the parties
of the second part in liquidation of the second part's
for drilling the well in accordance with the terms of the
contract.

The contract contained the following clause, to-wit:
it will be necessary to continue in maintaining the operation
at issue herein and this clause provides, "that it is the
intention of the parties of the first part to organize a
corporation to take over the oil and gas lease from the
said well is to be located, and certain other oil and gas
leases, rights and obligations under this contract, and
when so organized the parties of the second part hereby
agree to authorize for and pay for twenty-five shares of

the capital stock of said corporation at ten dollars per share, or to allow the par value thereof to be deducted from the consideration to be paid them under this contract in consideration of such stock". The contract further provides that if any question should arise about its performance that such condition shall be controlled and decided by the Ohio Oil Company's usual and customary contract for the drilling of oil and gas wells. The contract is signed and sealed by each of the parties.

The declaration then avers that they drilled the well to the depth of one thousand seven hundred sixty one (1761) feet, and completed their contract according to its terms and provisions and that the defendants refused to pay to the plaintiffs the said amount so agreed by them to be paid, or any part thereof. The other counts of the declaration were substantially the same. To this declaration the defendants filed a plea of general issue and several special pleas, and among them a plea called the seventh special plea, which avers that the plaintiffs ought not to have their ~~above~~ said action, "Because they say this suit is maintained by the plaintiffs upon an alleged agreement in writing, set out in haec verba in the said declaration and each count thereof" and it appears by the said agreement declared upon "That it is the intention of the parties of the first part (being these two defendants) to organize a corporation to take over the oil and gas lease upon which said well (being the well in controversy) is to be located, and certain other oil and gas leases, and their rights and obligations under this con-

the capital stock of said corporation as the same may be
shared, or to allow the net value thereof to be distributed
the contribution to be made under this contract to
consideration of each stock. The contract further provides
also that if any question should arise about the contribu-
tion that each condition shall be controlled and decided by
the Ohio Oil Company's usual and customary contract, the
drilling of oil and gas wells. The contract is signed and
sealed by each of the parties.

The declaration then avers that they drilled the
well to the depth of one thousand seven hundred and fifty
(1750) feet, and completed their contract according to the
terms and provisions and that the defendants refused to pay
to the plaintiffs the said amount so agreed upon by the
parties, or any part thereof. The other counts of the decla-
ration were substantially the same. To this declaration the
defendants filed a plea of general issue and denied all the
facts, and among them a plea called the seventh count upon
which avers that the plaintiffs agreed not to sue them for
said action, because they say this suit is barred by
the plaintiffs upon an alleged agreement in writing, and that
in fact there is no such agreement and the defendants
and it appears by the said agreement declared upon that
is the intention of the parties of the first declaration
these two defendants in organizing a corporation to take over
the oil and gas lease upon which said suit (which was made
in controversy) is to be located, and both in fact and
law, and their rights and obligations are hereby
settled.

tract"; and that the plaintiffs having so agreed with these defendants, the corporation was organized under the name of the West Salem Oil and Gas Company, the co-defendant herein, and its charter granted by the Secretary of the State of Illinois on the 2nd day of October, 1914, and soon thereafter the West Salem Oil and Gas Company took over the land upon which the well was to be drilled by the plaintiffs, and thereby, as provided in the said agreement made between these defendants and the plaintiffs, succeeded to all the rights and obligations of these defendants under said agreement, and which was acceptable to the plaintiffs, and thereafter the said plaintiffs worked and drilled on the said land under the directions and employment of the said West Salem Oil and Gas Company, and not of these defendants, and from that time all the work of drilling the well done by the plaintiffs and all the matters and things pertaining thereto, until the plaintiffs quit and abandoned the work, was done for the West Salem Oil and Gas Company and not for the defendants; and by reason thereof they were exonerated and discharged from any and all liability under said agreement, which was well known to the plaintiffs and acceptable to them, and all business was done and performed by the plaintiffs and the West Salem Oil and Gas Company and not with these defendants". To this plea the plaintiffs filed a special and general demurrer, which was overruled by the court, and the plaintiffs having elected to stand by their demurrer, judgment was rendered upon this plea in bar of the action, to which ruling of the court the plaintiffs excepted and prayed an appeal to this court and now present for our

...and that the plaintiffs having no money ...
...the corporation was organized under the laws of
...the West Salem Oil and Gas Company, the defendants ...
...and its charter granted by the Secretary of the State of
...Illinois on the 24th day of October, 1911, and from ...
...after the said oil and gas company took over the lease
...upon which the well was to be drilled by the plaintiffs, the
...thereby, as provided in the said agreement made between
...these defendants and the plaintiffs, proceeded to sell the
...rights and interests of these defendants under said lease
...and which was acceptable to the plaintiffs, and ...
...after the said plaintiffs worked and drilled on the well ...
...under the directions and employment of the said ...
...Oil and Gas Company, and not of these defendants, and from
...that time all work of drilling the well was done by the
...plaintiffs, and all the matters and things pertaining ...
...until the plaintiffs quit and abandoned the well, and ...
...for the West Salem Oil and Gas Company and not for the de-
...endants; and by reason thereof they were injured and
...discharged from any and all liability under said lease ...
...which was well known to the plaintiffs and acceptable to
...them, and all business was done and controlled by the ...
...the West Salem Oil and Gas Company and not by
...these defendants". To this the plaintiffs filed a
...special and general demurrer, which was overruled by the
...court, and the plaintiffs having elected to plead by their
...demurrer, judgment was rendered upon this case in the
...action, to which ruling of the court the plaintiffs ...
...and prayed an appeal to this court and was ...

consideration the question as to the sufficiency of this seventh special plea to bar the plaintiffs right of action.

This plea is based upon that clause in the contract above quoted, which provides for the organization of the corporation to take over the leases referred to in the contract and their rights and obligations under the contract, and that the plaintiffs are to subscribe for twenty-five shares of the capital stock at ten dollars per share.

We have examined this contract, and especially the clause referred to, carefully and we believe that this clause of the contract is simply a recital of what the defendants intended to do, that is, to form a corporation to take over the oil and gas lease upon which said well is to be located and certain other oil and gas leases and their rights and obligations under this contract. The plea then avers that the corporation was organized and took over the lease upon which the well was to be drilled and thereby as provided in said agreement succeeded to all the rights and obligations of these defendants under said agreement. The object of the pleader seems to have been to set up an agreement whereby defendants were to organize a corporation and as soon as done that the obligations and liabilities of the defendants were to be assumed by the corporation and the defendants released. To do this it was necessary that the pleader should set out such an agreement with definiteness and certainty and not in a mere argument. *10 Am. & Eng. L. & C. 2d, Sec. 132. Buttrough on Pleading and Practice, page 17.*

Does this plea so allege? It sets out the intention to organize the corporation and its organization and the tak-

consideration the question as to the propriety of the
seventh special plea to bar the plaintiff's claim of injury.
This plea is based upon the fact that in the contract
above quoted, which provides for the organization of the
corporation to take over the lease referred to in the con-
tract and their rights and obligations under the contract,
and that the plaintiffs are to be responsible for the
shares of the capital stock of ten dollars per share.
The court have examined this contract, and find that the
clause referred to, certainly and we believe to be the
clause of the contract is simply a recital of what the de-
fendants intended to do, that is, to form a corporation to
take over the oil and gas lease which said contract is
to be located and certain other oil and gas leases and
their rights and obligations under this contract. The court
then says that the corporation was organized and took over
the lease upon which the oil was to be drilled and thereby
as provided in said agreement succeeded to all the rights
and obligations of these defendants under said contract.
The object of the plea is to have been to set aside the
agreement whereby defendants were to organize a corporation
and as soon as done that the obligation and liability of
the defendants were to be assumed by the corporation and the
defendants released. To do this it was necessary for the
pleader should set out such an agreement with sufficient
and certainty and not in a mere recital. The court in lead-
ing, Vol. 13, at 100, in stating the law, says that
the court is not to be misled by the fact that the
to organize the corporation and the obligation and the

ing over of the lease and then avers that thereby, as provided in said agreement, such corporation succeeded to all the rights and obligations of the defendants under said agreement. If the pleader refers to that part of the agreement set out in the plea, an examination of this shows that all it amounts to is a declaration of an intention to organize such corporation and take over certain leases and their rights and obligations under this contract; if the pleader refers to the agreement set out in the declaration (which we believe he does) then such agreement declares an intention to organize the corporation and take over the leases, which is immediately followed in the same clause by an agreement upon the part of the plaintiffs to subscribe and pay for twenty five shares of stock at ten dollars per share, either in cash or to be deducted from the amount agreed to be paid for drilling of the well. This we believe to be the true meaning of this provision in the agreement and that it does not provide and was not intended to release the defendants from their obligation to pay for the drilling of the well upon the organization of the corporation, but was inserted for the purpose of requiring plaintiff to accept twenty-five shares of the stock upon payment for their work. It is true the plea also alleges that the plaintiff worked and drilled under the direction and employment of the corporation and for it, and not for defendants; even if the plaintiffs did so work that would not discharge the defendants from their obligation to perform according to the terms of the contract unless there was a specific agreement to a

ing over of the lease and then over the lease, as pro-
vided in said agreement, such corporation is understood to be
the rights and obligations of the defendant under said
agreement. If the plaintiff refers to the fact of the agree-
ment set out in the plea, an examination of said lease will
show that all it amounts to is a declaration of an intention to or-
ganize such corporation and take over certain leases and
their rights and obligations under this contract; if the
plaintiff refers to the agreement set out in the declaration
(which he believes he does) then such agreement declares an
intention to organize the corporation and take over the
leases, which is immediately followed in the same clause
by an agreement upon the part of the defendant to surrender
and pay for twenty-five shares of stock at ten dollars per
share, either in cash or to be deducted from the amount
agreed to be paid for drilling of the well. This he believes
to be the true meaning of this provision in the agreement
and that it does not provide and was not intended to release
the defendant from their obligation to pay for the drilling
of the well upon the organization of the corporation, but
was inserted for the purpose of relieving plaintiff of the
cost twenty-five shares of the stock upon payment for same
work. It is true he also alleged that the defendant
worked and drilled under the direction and employment of the
corporation and for it, and not for defendant; even if the
plaintiff did so work that would not discharge the defen-
dant from their obligation to perform according to the terms
of the contract unless there was a specific agreement made

and set out that such should so operate. It is also averred in said plea that by reason of the said acts the defendants were released and discharged. This is simply a conclusion of the pleader. We believe that this plea is indefinite and uncertain and that it does not set out such facts as release defendants from the payment of the work performed under the contract.

The judgment of the lower court is reversed and the cause remanded with directions to sustain the demurrer to the defendants seventh plea as pleaded.

REVERSED AND REMANDED WITH DIRECTIONS.

Not to be reported in full.

performed under the contract.

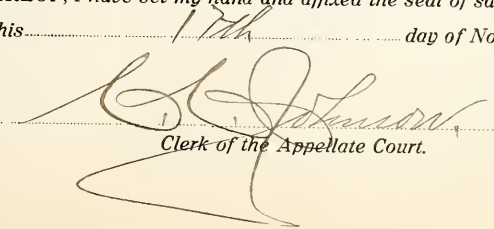
the judgment of the lower court is reversed and the cause remanded with directions to set aside the judgment and to the defendants seventh day of January.

THE UNIVERSITY OF CHICAGO

...not in danger of ...

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this.....17th..... day of November, A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

100



2705

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 188

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Twelfth}~~Thirteenth~~ day of ^{December}~~November~~, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Atemisa Pask
Appellee

ERROR TO
APPEAL FROM

No. 21 vs.

March Term, 1916.

Circuit COURT

Caroline Penn
Appellant

St. Clair COUNTY

TRIAL JUDGE

HON.

George A. Brown

March Term, 1916.

Artemissa Lark,

Appellee

v.

Caroline Penn.

Appellant

Appeal from St. Clair.

Opinion by Higbee F. J.

---060---

This was a suit brought by appellee against appellant to recover damages on account of severe and permanent injuries received by her by falling down a defective stairway in a house owned by appellant, rented by appellee's husband and occupied by him and his family. The jury returned a verdict against appellant for \$1500 for which amount judgment was entered against her.

On November 20, 1913, appellee's husband desired to rent a house for himself and family and, as shown by the proofs, a son and daughter of his, on that day seeing the "for rent" sign of Beckwith Brothers Company, posted on the premises, went in the back way and up the stairs to examine the same, the premises consisted of the second story of ~~the~~ a brick building. Afterwards a son went to the office of Beckwith Brothers Company, told them about looking at the place, and that there was some rubbish in the basement, a door off the hinges and a board at the top of the front stairs loose. He was told, as he says, that the rent was \$20 a month in advance and if he would put \$10. up the repairs would be made at once.

Later the sister took the \$10 to the agent and the next day the balance of the rent for the month was

paid, and the family moved in on Friday, November 21.

The board in the stairway was not fixed and on Monday evening, appellee, who had not been informed and did not know of its defective condition, started down the front stairs with a lamp and when she stepped on the loose board, it slanted forward with her, throwing her to the bottom of the stairs injuring her spine and other parts of her body, severely. At the conclusion of appellee's evidence, the attorneys for appellee filed an amended declaration setting forth the facts somewhat as above stated and charged that Beckwith Brothers Company was the agent of appellant to rent the premises; that they offered to rent the premises to appellee for \$20 per month in advance and then and there promised and agreed with him to repair said loose or insecure board or plank on said stairway and that appellant agreed with said company to rent said premises on said terms and conditions and did so rent them. The case went to the jury on this declaration, and after the verdict was returned and a motion for a new trial was made, the court permitted appellee to file a second amended declaration which omitted the statement of a promise to repair the defective stairway on the part of appellant's agent.

Appellant contends that the court erred in its rulings in regard to the evidence and in passing upon the instructions, and also that the verdict is against the law and the evidence. That there was a loose board at the top of the stairs, that appell^{ee}~~ant~~ was unaware of its condition, that it tipped forward when she stepped upon it and caused her to fall down stairs, that she was injured by her fall and that her injuries were severe, were not questions in dispute, nor was there any question but that the husband of appellee and their son and daughter were aware of the loose board. Appellant testified that while

1

...the ... in the ...

The ... is the ...
Monday evening, ...
did not know of the defective condition, ...
front stairs with a lamp and ...
board, it alighted forward ...
bottom of the stairs ...
her body, severely. At the conclusion of ...
evidence, the attorney for ...
declaration setting forth the facts ...
stated and charged that ...
agent of appellant to rent the premises; ...
to rent the premises to appellee for ...
nce and then and there promised and ...
pair said lease or license ...
very and that appellant ...
said premises on said terms and conditions ...
then. The case went to the jury on the ...
after the verdict was returned and a ...
was made, the court permitted ...
included declaration which ...
also to repair the defective ...
lant's agent.

Appellant contends that the court ...
rulings in regard to the evidence and ...
instructions, and that the verdict is ...
and the evidence. That there was a ...
top of the stairs, ...
dition, that it then ...
caused her to fall down stairs, ...
her fall and that the ...
long in dispute, and the ...
instead of appellee and ...
of the lower court. Appellant ...

Blackwith Brothers Company was her agent to rent the premises, they had no authority to make repairs without consulting her and her counsel contends that appellee, in making out her case had no right to rely upon any proof that appellant, through her agent, failed to repair the defect complained of after promising to do so. The rule relied on by appellant, is stated in Sunasack v. Grey, 196 Ill. 569, where it is stated, "The law is well settled that the rule of caveat emptor applies to a contract of letting, and the landlord is not bound to make repairs unless he has assumed such duty by express agreement with the tenant. The tenant takes the premises as he finds them, subject to his own risk, and there is no implied covenant on the part of the landlord that they are fit for habitation or fit for the purposes for which they are rented, or that they are in any particular condition. The landlord is therefore not liable for damages resulting to the tenant by reason of the demised premises being out of repair, unless he has expressly bound himself to make repairs by the terms of the contract to let". The declaration upon which the case went to the jury contained a charge ^{promise to} of a repair on the part of the landlord through her agent, but was amended before judgment so as not to include any charge of a failure to keep a promise to repair, and counsel for appellant, here say that they do not rely upon such promise to support the judgment in behalf of appellee.

It appears, however, that the evidence of a promise to repair was offered ^{by Appellee} and admitted by the court and while her counsel insist that this was offered only to show notice to appellant of the defective condition existing in the building, yet such evidence may have been very

...the fact that the defendant was not a party to the contract...
...they had no authority to bind the plaintiff...
...the law and the contract...
...out her case...
...appellant, through her agent, failed to...
...complained of...
...on by appellant, is stated in...
...500, where it is stated, "The law is well settled that the
rule of...
and the landlord is not bound to make repairs...
has assumed such duty by express agreement with the tenant...
the tenant takes the premises as he finds them, subject to
his own risk, and there is no implied covenant in the lease
of the landlord that they are fit for habitation or for any
the purposes for which they are rented, so long as they are
in any particular condition. The landlord is...
not liable for damages resulting to the tenant by reason
of the defective premises being out of repair, unless he has
expressly bound himself to make repairs...
the contract to let". The declaration...
went to the jury contained a charge...
part of the landlord through his agent, and was...
before judgment as to not to include any charge of a...
use to keep a structure in repair, and counsel for...
here say, that they do not rely upon such provision to...
the judgment in behalf of...
...is...
rise to repair...
while...
who...
ing...

damaging to appellant's case. At the time it was admitted, the declaration contained the charge of promise to repair on the part of appellant and the case was tried with that declaration in view.

It may have had much to do with causing the jury to give a verdict in favor of plaintiff though it was wholly incompetent after the amendment of the declaration. It is upon the declaration as amended after verdict, that appellant must rely to sustain his judgment, and considering the condition of the record as stated, we are inclined to the belief that the admission of this evidence must be held to have been error on the part of the trial court. The facts in this case showed that the defective condition of the step in question was not latent, but was easily discoverable and was known both to tenant, who was the husband of appellee and her children. The question therefore arises whether she occupied a position separate and apart from her husband as a third person, so far as the rental contract and her occupation of the premises, were concerned, or whether her rights were identified with those of her husband. It is plain that the husband could not recover for injuries caused by the defective condition of the step in the absence of a contract to repair, as is the case here, and it is to be determined whether appellee, his wife, residing with him, is entitled to recover for injuries occasioned by the defective condition of the premises of which he was fully advised. The authorities upon this subject are not altogether satisfactory, but the general rule appears to be that persons identified with a tenant, ^{or his} have the same right to recover against the landlord as the tenant's right would have been had the accident occurred to him. The statement is

...in to appellant's case. ... the declaration contained the matter of ...
... on the part of appellant and the case was tried ...
... that declaration in view. ...
... It may have been such to do with the ...
... to give a verdict in favor of plaintiff though it was ...
...ly incompetent after the amendment of the declaration. ...
... it is upon the declaration as amended after verdict, that ...
... appellant must rely to sustain his judgment, and ...
...ing the condition of the record as stated, we ...
... to the belief that the admission of this evidence ...
... held to have been error on the part of the trial court. ...
... The facts in this case showed that the ...
... of the step in question was not false, but ...
... discoverable and was known both to appellant and ...
... husband of appellee and her children. ...
... fore arises whether she occupied a position ...
... apart from her husband as a third person, so far as ...
... rental contract and her occupation of the premises, ...
... concerned, or whether her rights were identical with ...
... those of her husband. ... It is plain that the husband ...
... could not recover for injuries caused by the defective ...
... condition of the step in the absence of a contract to ...
... party, as in the case here, and it is to be determined ...
... whether appellee, his wife, residing with him, is entitled ...
... to recover for injuries occasioned by the defective condition ...
... tion of the premises of which he was joint tenant. ...
... The authorities upon this subject are not ...
... factory, but the general rule ...
... identified with a person, ...
... against the landlord as the tenant's ...
... been had the accident occurred in ...

made in ²⁴ Cyc. on page 1119, bearing upon this subject that, "the general rule is that a sub-tenant, guest or servant of the tenant, is regarded as so far identified with the tenant, that his right to recover against the landlord is the same as the tenant's right would be had the accident happened to him; but he can have no greater claim against the landlord than the tenant himself would have under like circumstances." And this rule appears to be sustained by a number of authorities there cited. If a subtenant, guest or servant of a tenant must be regarded as so identified with the tenant that he cannot recover against the landlord if the tenant could not recover, there would appear to be even more reason for holding that the interests of the wife of the tenant were so identical with his, that she could not be permitted to recover in a case like this where the tenant himself had no right of recovery. For the reasons above given, we are of opinion that the judgment in this case must be reversed, and as we are of opinion that no recovery can be had under the facts as claimed to exist by appellee, the cause will not be remanded.

Reversed

Statement of facts to be incorporated in the judgment

We find that the lease to the premises in question, was made between appellant and Oliver Earl, the husband of appellee; that ~~is~~ there is no claim in the amended declaration, of any covenant in the lease to repair the leased premises; that the defective condition of the stairway, which caused the injury to appellee, was known to appellee's husband; that at the time of her injury appellee was residing in the leased premises with her husband and their family,

5

Not to be reported in full

Not to be repaid in full

their family,

are residing in the leased premises with their family and

appellee's husband; that at the time of her injury appellee

was, which caused the injury to appellee, was known to

leased premises; that the defective condition of the stairs

decision, of any covenant in the lease to repair the

of appellee; that there is no claim for damages

ion, was and between appellee and her husband, the husband

he find that the lease to her was made in quest-

Statement of intent to be incorporated in the judgment

ended.

claimed to exist by appellee, the cause will not be re-

opinion that no recovery can be had under the facts as

judgment in this case must be reversed, and as we are of

For the reasons above given, we are of opinion that the

where the tenant himself had no right of recovery.

she could not be permitted to recover in a case like this

of the wife of the tenant were so identical with this, that

appear to be even more reason for holding that the husband

landlord if the tenant could not recover, the wife would

filled with the tenant that he cannot recover against the

quest or servant of a tenant must be regarded as so identi-

a number of authorities there cited. In a subsequent

circumstances." And this rule appears to be controlling in

the landlord than the tenant himself would have under like

knowned to him; but we can have no reason for holding

the same as the tenant's right would be had in a similar

tenant, that the right to recover against the landlord is

of the tenant, is regarded as so identical with the

"the general rule is that a tenant's right to recover

made in favor of the wife of the tenant, bearing upon the fact

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 13th day of December,
A. D. 1916.


Clerk of the Appellate Court.

OPINION

Fee \$

.....

2406

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and sixteen, the same being the 24th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

203 I.A. 189

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighth} ~~Thirteenth~~ day of ^{January, A.D. 1917} ~~November, A.D. 1916~~, there was filed

in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The People ex rel. Silas Cook et al,

Defendants in Error.

vs.

No. 8

October
March Term, 1916.

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

W. C. Goodall, et al,

Plaintiffs in Error.

TRIAL JUDGE

HON. GEORGE A. CROW

The People ex rel, Elias Clark, et al.,

Defendants in error.

vs.

W. C. Goodall, et al.,

Plaintiffs in error.

Opinion by Hughes, J.

---oOo---

Defendants in error, whom we will call "relators," by leave of court first obtained, filed an information in the nature of a quo warranto, to the January term, 1916 of the circuit court of St. Clair county, against plaintiffs in error, hereinafter called the respondents, charging them with unlawfully exercising the offices or directorships of the Bankers Accident Insurance Company and demanding that they show by what right they claim to exercise such offices. To this information, respondents filed two pleas of justification, the first one set out in full the calling the annual election of directors of the company to be on January 13, 1916 at 2 P. M., at the office of the company in the Metropolitan building, West St. Louis, Illinois.

The plea further alleged that the members assembled at the designated time and place; that the president, vice president, and secretary failed and refused to call and thereupon the members organized by the election of

... ..

.

1997

1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 26

... ..

... and ...

2000

and thereupon the members organized by the election of
vice president, and secretary listed and returned to the
died at the designated time and place; and the president,
The other members elected were the members named
in the Metropolitan Building, New York, New York,
January 10, 1913 at 11:00 a.m. at the office of the company
annual election of directors of the company to be the
location, the first one was not in that was called the
to take information, respondents listed two names as possible
show by that that they agree to withdraw from office.
Bankers' Resident Insurance Company and Insurance Trust Company
with authority regarding the office of secretary of the
error, nevertheless called the respondents, and they
directly court of New York County, New York, and the
nature of a quo warranto, and the company was, who is the
leave of court may be obtained, that he is entitled to the
Lefkowitz in error, and he will not be liable, v

W. C. Goodall, as chairman of the meeting and Oliver Webb as secretary pro tem; that respondents were duly elected directors of the Western Accident Insurance Company for the ensuing year; that a ballot was taken and all of the votes were cast for respondents who thereafter assumed to exercise the said offices. The second plea set up due notice in accordance with the by laws and the assembling of the members at the time and place above mentioned; that a quorum of the members were present and were duly convened; that the president of said company, W. C. Goodall, presided at said meeting and upon the refusal of the secretary to act, Oliver Webb was appointed secretary pro tem; that respondents, and Albert Diehm who is a relator, were duly elected directors and that respondents accepted and took charge of the company and the office and property of the company and have acted and are still acting as such directors.

To the pleas of the respondents, the relators filed five replications. The first alleged that respondents did usurp, intrude into and unlawfully hold and exercise the offices of directors of said insurance company and still continue to do so without authority of law. The second alleged that the supposed election mentioned in said plea was not at an authorized meeting of the members of the company at which votes might be cast for said offices and that therefore respondents were not elected to said offices as set out in said pleas. The third alleged that W. C. Goodall was not president of said company and the supposed election was not at an authorized meeting of the members of said company at which votes might be cast for said offices and *that*

therefore respondents were not elected to said offices.
Respondent alleges that on or about the 15th day of November, 1918, the fifth alleged that at a regular meeting of the board of directors of said Insurance Company, held on the 26th day of November, 1918, the resignation of J. C. Goodall as president of said company, was accepted by an affirmative vote of the majority of all the members of said board; that from and after said date said J. C. Goodall ceased to be president of the company and had no further right or power to act as such; that at a special meeting of the board of directors called for that purpose, on the 28th day of November, 1918, Elias Cook, one of the members of the board of directors, was duly elected president of the company and entered upon the duties of his office and continued to exercise and perform such duties until January 1, 1919, and he was restrained and enjoined from presiding at a meeting of directors' meeting of said company at the suit of J. C. Goodall, Charles L. Barker, W. J. Miller and J. C. Goodde, all of whom were respondents; that at the time the (1918) meeting of the members of said company was called pursuant to notice as alleged in said plea, said Elias Cook was enjoined and restrained by an order of court, from acting or presiding as aforesaid, and that by reason thereof, he refused and declined as president, to call said annual meeting to order or to act as chairman of said meeting, whereupon Goodde, the vice president of the company at the time and place stated in the notice for the annual meeting, as alleged in the plea, convened the same and presided a meeting for the election of officers and directors in conformity with

the by laws of the company; that at said election, more than fifty members appeared in person and by proxy, as required by the by laws and voted for said Cook as president and director, Edmond Koedde as vice president and director, W. C. Goodall as secretary and director, Albert Wieman, as treasurer and director and J. J. Lee, William F. Sauntz and Whitman Daniels as director of said company for the term of one year; that more than five hundred members of said company voted in person or by proxy for said last named persons for the offices named and that no votes were cast for any other candidates; that neither the president, vice president, secretary or treasurer of the company convened or participated in or conducted the supposed election held at said alleged meeting of the members of said company, at which the respondents pretend and now claim to have been elected directors of said company; that as a result thereof the respondents were not nor was either of them elected a director of the company at the alleged meeting held by W. C. Goodall and others on January 11, 1914 and said respondents are unlawfully and without warrant or authority of law, exercising and usurping the office of directors of said company.

Amendments were filed to the first three recitations and a traverse to the fifth. To the latter a rejoinder was filed and issue joined. At the conclusion of the evidence offered on the trial on behalf of the respondents, a peremptory instruction was given by the court directing the jury to "find the respondents guilty or unlawfully usurping the offices of directors of the Bankers Accident Insurance com-

that of last of the year, 1910, and that the
same will be continued in 1911, and that the
request by the Board and voted for said year was
sent and received, and that the same was received

director, A. A. Wood, Jr., secretary, and director,
and director, and director, and director, and director,

1. That the Board is a director of said company
for the year 1911; that there have been no changes

of said company, and that the same is in the
last named position for the year 1911, and that

were not for any other reason; that the same
last, and received, and that the same is in the

position, and that the same is in the position
then held at said office, and that the same is in

company, and that the same is in the position
have been elected directors of said company, and that

board the directors, and that the same is in the
elected a director of the company, and that the same

held by J. C. Wood, Jr., and that the same is in the
two directors are J. C. Wood, Jr., and J. C. Wood, Jr.,

of law, and that the same is in the position
said company.

1. That the same is in the position
time and a director of the company, and that the same

was filed and issue joined, and that the same is in the
offered on the trial on behalf of the company, and that

very instruction was given by the court directed the jury
to find the respondents guilty of unlawful conduct, and

offices of directors of the company, and that the same is in the position

pany as alleged in the information herein. The jury returned a verdict in accordance with the instruction of the court and thereupon a judgment of ouster on the verdict and for costs was entered against the respondents, who have brought the case here for review, by writ of error. Relators challenge the right of respondents to exercise the duties of the office claimed by them and the principal question for our consideration, is the legality of the election under which the relators claimed title to such offices. The following provisions of the by-laws of the company named the officers thereof, designated their duties and prescribed the manner of their election:

"Article III.

"Section 1. The officers of the company shall be a president, vice-president, secretary and treasurer, and a board of directors, consisting of seven members, four of whom shall be the president, vice-president, secretary and treasurer of the company. The officers and directors in office shall continue to hold such office until their successors are elected and qualified.

"Section 2. The officers and directors shall be elected by ballot at the annual meeting to be held in the winter provided and annually thereafter.

"Section 6. In all meetings of the members it shall be lawful for any member of this company to be represented by a properly delegated proxy, who shall have full power to represent said member at said meeting, and such proxy shall have the same rights, powers and privileges as the member delegating or appointing him would have if he were personally

[illegible][illegible]

Section 2. The following provisions shall be altered by deleting at the annual meeting to be held on December 14, 1954 and amended accordingly.

Section 1. In the building of the bridge it is to be
level for the width of the roadway on the lower level
a properly calculated curb, and shall also have a
representative curb, and shall be level, and shall
have the same width, curves and grades as the roadway.

present at such meeting, and any vote cast by such proxy for the election of any officer of this company or on any matter coming before the membership of the company shall have the same credit and effect as it would have if it were personally cast by the member delegating or appointing such proxy.

Article IV.

Section 1. It shall be the duty of the president to preside at all meetings of the members and of its board of directors, and to have general supervision over the officers and affairs of the company, subject to the direction and approval of the board of directors. In the absence of the president, the vice-president shall preside at the meetings of the members and of its board of directors and have the same power as the president, subject to the order and approval of the board of directors.

Section 2. It shall be the duty of the secretary to keep full minutes of all meetings of the members and of the board of directors; to prepare and send all notices of meetings of the members and of the board of directors.

Article V.

Section 1. The members shall hold an annual meeting in the City of East St. Louis, Illinois, on the second Thursday of January of each year, unless such day shall fall on a legal holiday, in which event said meeting shall be held on the following day. The secretary shall cause to be inserted in two papers of general circulation in the city of East St. Louis, not more than twenty days and not less than ten days before the date of such annual meeting, notice of the time and place at which such meeting is to be held.

present at such meeting, and any vote cast at such meeting for the election of any officer or director shall be counted as coming before the meeting at the time when the same credit and effect as if voted at the meeting at which it was cast by the member delegating or appointing him shall be given.

Section 1. It shall be the duty of the members to provide at all meetings of the directors and to have General Meetings of the directors, and to have General Meetings of the directors and all affairs of the company subject to the control and approval of the board of directors. The president shall preside at all meetings of the directors and of the board of directors and shall have the same power as the president, subject to the control and approval of the board of directors.

Section 2. It shall be the duty of the secretary to keep full minutes at all meetings of the directors and of the board of directors; to prepare and read at each meeting of the directors and of the board of directors a report of the secretary and of the board of directors.

Section 3. The members shall hold a General Meeting in the City of New Orleans, Louisiana, on the second Monday of January of each year, unless such day shall fall on a legal holiday, in which event said meeting shall be held on the following day. The secretary shall cause to be published in two papers of general circulation in New Orleans at least 10 days, not more than twenty days and not less than ten days before the date of such annual meeting, a notice of the time and place at which such meeting is to be held.

Section 4. Fifty members shall constitute a quorum for the transaction of business at any meeting of the board, and four directors shall constitute a quorum for the transaction of business at any meeting of the board of directors, except as herein otherwise provided, but a less number in either instance adjourn the meeting."

It is agreed by both parties that the adjourned meeting to be held for the annual election of directors on January 11, 1916 at 2 P. M. at the office of the company in the Metropolitan building in East St. Louis, Illinois, was given in strict accordance with the by laws. Respondents claim and introduced proof tending to show that the facts in the case were as follows: Before the adjourned election, the relators had gone into the office of the company, locked the doors and refused admission to others. Respondents and certain other members gained admission by unlocking the side door, to which W. C. Goodall had a key. At two o'clock, there being no move on the part of the relators to call the meeting to order, W. C. Goodall called it to order and was nominated to act as chairman by Clyde D. Miller, whereupon said Goodall took the chair and appointed a sergeant at arms. W. C. Goodall had been president the year before and had tendered his resignation in August, 1915, which was accepted November 20, following. He made no claim, however, to be still president because the by laws provided that the officers should hold over until their successors were duly elected and qualified and he testified that no successor had been properly elected, although the directors had professed to elect Elias Cook as president at a directors

in their instance through the meeting.

It is agreed by both parties that the election for the
meeting to be held for the annual election of officers on
January 1, 1918 at 11 A.M. at the office of the
the Metropolitan Building in New York City, New York, was
given in strict accordance with the provisions of the
of the introduced paper tending to show that the
in the case were as follows: One hundred and
election, the first vote was cast for the
and, toward the latter end of the election
respondents and certain other persons called attention to
unlocking the side door, at which time the
at the election, the door being locked, the
failed to call the election to order, and
it is further stated that the door was locked by the
D. Miller, wherein said door was locked and
ed a sergeant at arms, who stated that the
year before and had ordered the election to be held
which was accepted by the
chief, however, to be still a permanent resident of the
provided that the officers should be elected in the
cesses were duly elected and qualified for the
as officers and duly qualified, and the
and ordered to effect the same as a condition of the

meeting held on November 29, 1918. Wiley Coel, who claimed to be president of the company by appointment of the board of directors, protested against the participation in the proceedings of J. C. Goodall and Clyde A. Miller on account of the supposed cancellation of their policies and he refused to participate in the meeting unless the two members were excluded. J. C. Goodall as secretary made the same protest and also stated that he would not take part in the meeting unless the two said members were excluded. Alver Cobb was thereupon appointed secretary pro tem and undertook his duties as such. The meeting proceeded by a committee on credentials to canvass the eligibility of members present and proxies presented to them and elected respondents directors, as named in their pleas. Afterwards the relators disappeared at a table on the east side of the same room in which the above meeting is claimed to have been held and the meeting was called to order by vice-president Goedde and afterwards presided over by William L. Rauntz a director and one of the relators. Goedde was elected as secretary of the meeting. The second meeting, which respondents claimed was held called to order until after their meeting had adjourned, proceeded to elect relators officers and directors of the company as stated in their petition for leave to file the information. Respondents claim that in their meeting in addition to the members present in person, there were 200 proxies present, which gave them a quorum and that the proceedings were in every way regular. Upon the trial, however, the court concluded all but about 30 of these proxies upon the ground that there was not proper proof of their election.

To meet the case presented by respondents, proof, tending to show the following state of facts was introduced by the relators; At the annual election of members held in January, 1915, W. C. Goodall was elected president and director, Edmund Wedde vice president and director and J. A. Goodall secretary and director, Albert Diehs treasurer and director and J. J. Dies, William L. Baunz and Alvin Cook directors. These men succeeded themselves at each annual election thereafter, up to and including the annual meeting held in January, 1915. Dissentions afterwards came to have arisen between the president W. C. Goodall and the secretary J. A. Goodall, who were brothers and later, in August, 1915, both the president and secretary tendered their resignations as such officers, to the Board of directors. The board took no action upon the resignations until November 26, when a motion was made by one of the directors that the resignation of the president and secretary be accepted, which was voted down. Immediately afterwards, another motion was made and seconded that the resignation of the president be accepted and this was carried by a vote of 10 ayes to 10 nays. W. C. Goodall was present at the meeting when his resignation was accepted, the entire board being in attendance, but he did not vote upon that question. The written resignation was as follows: "I herewith tender my resignation as president of the Bankers Accident Insurance Company, to be effective from its acceptance by the board of directors." W. C. Goodall testified that after his resignation was accepted, "I was called upon to do nothing. I did nothing."

to meet and were presented at the meeting, and
tending to show the following state of affairs and
by the relation; at the same time it was stated
January, 1911, that the directors were
director, and the vice president, and the secretary
and director, and director, and director, and director
and director and T. C. Lee, William, and others
Good directors. There are no directors in the
annual election there, but a new election was held
meeting held in January, 1911. The directors were
to have arisen between the president and the
secretary T. C. Lee, and the vice president and
April, 1911, both the president and the vice president
the relations as such officers, to the board of directors.
The board took no action upon the resolution until
22, but a motion was made by one of the directors that the
resolution at the president and secretary be accepted, and
was voted down. Immediately afterwards, another motion was
made and recorded that the resolution at the president be
accepted, and this was carried by a vote of 10 to 5.
May, T. C. Goodell was present at the meeting and the
motion was accepted, the entire board being in attendance,
and he did not vote upon that question. The resolution was
then the he followed it with 10 to 5, and the motion was
president of the board of directors, and the board of directors
effective from the acceptance by the board of directors.
T. C. Goodell recalled that after the resolution was
carried, it was called upon to be carried, and the motion...

I interviewed them at various times between the 29th day of November and the date of the election; I told them I did not think the situation was in proper shape. I thought something ought to be done to adjust it to get me back into the company". At the time of the annual meeting on January 13, 1915, the relators were inside the office at the time W. C. Goodall and the party with him entered by the side door which he unlocked. Included in the latter party were two constables and a deputy sheriff. The latter proceeded to serve an injunction writ issued upon the bill filed by W. C. Goodall and others restraining Cool from acting as president of the company or presiding at any meeting of the members or directors of the company. The W. C. Goodall party gathered around a table on one side of the room and immediately when the hour of two o'clock arose, W. C. Goodall called the meeting to order and announced that the "election for directors of the company would now take place". W. C. Goodall was thereupon made chairman of the meeting which he had just called to order and Clyde E. Miller, secretary acted as scribe. The election of both president and secretary being determined by a viva voce vote of those present. There was no definite proof of the number of persons who were present and voting for the election of officers and the witnesses who were questioned upon that subject, could not name more than fifteen persons, but it was evident that there were not fifty members present at any time in the room. After the meeting of the W. C. Goodall party was organized, a number of proxies were presented and a vote was taken for directors resulting in the election of respondents, together with the

I interviewed him at various times between the 15th day
of November and the 1st of December 1915 when I did
not think the situation was in proper shape. I thought
something ought to be done to adjust it. I did not feel that
the company. At the time I was making a report on January
15, 1916, the registers were inside the office at the time
J. C. Goodall and the party with him entered by the side
door which he unlocked. Included in the latter party were
two conspirators and a security officer. The latter proceeded
to serve an injunction with issued with the 15th day
by J. C. Goodall and others restraining Good from acting as
president of the company or exercising any authority of the
members or directors of the company. The 15th day
party gathered around a table in the office at the 15th day
immediately after the hour of the strike vote, at 12:00 P.M.
called the meeting to order and announced that the registers
for directors of the company would be taken there.
Goodall was there on some occasion of the meeting with the
and just called to order and J. C. Goodall, according to
him. The election of such president and secretary were
determined by a viva voce vote of those present. There was
no definite proof of the number of persons who were present
and voting for the election of directors and the officers.
who were questioned as to that subject, could not recall
then fifteen persons, but it was evident that there were not
fifty persons present at any time in the room. After the
meeting of the J. C. Goodall party was announced, a number of
persons were arrested and a vote was taken for directors and
officers in the election of the officers, but they were not

relator Albert Diehn, as such officers. Sometime after two o'clock, witnesses placing it as late as 3:30, the vice president Goodde called to order another meeting on the east side of the room, which was presided over by William C. Laantz, one of the relators. At this meeting the relators and one Whitman M. Daniels, were elected directors. The above presents the claims and in substance, the proofs of the respective parties.

It is not necessary for us to consider whether the election at the meeting presided over by Mr. Laantz, was a legal election or not as the sole question here involves the right of respondents to hold and exercise the office of directors of said insurance company and that right appears to depend upon the regularity of the election claimed to have been held at the meeting presided over by W. C. Goodall. The respondents were bound to state in their pleas and show by the proofs, good authority for acting as directors, otherwise the relators were entitled to a judgment of ouster. *Garrigo v. The People ex rel*, 123 Ill.196. The proofs disclose clearly that as soon as the hour of 3 o'clock arrived, W. C. Goodall called the meeting to order and the circumstances, including the service of an injunction writ upon relator Elias Cook just previous to the meeting restraining him from presiding, would seem to show that he went to the meeting for that purpose and that the party with him understood and helped to carry out that design. The by-laws of the company provided that it was the duty of the president to preside at all meetings of the members and in the absence of the president, the vice president should preside. W. C. Goodall was

not president of the company at the time of said annual meeting as is shown clearly by his own testimony, as well as that of other witnesses. Edmund Goedde the vice president, was present at the meeting, and under the conditions then existing it was his duty to preside. It is claimed by respondents that Mr. Goedde did not undertake to perform the duties of his office and it was therefore necessary for some one else to call the meeting to order and preside. The proofs fail to show, however, that he was unwilling to preside and he in fact did later call the rival meeting to order. It also appears that Mr. Goedde was given secret, if not, opportunist, to call the meeting to order at 2 o'clock, as that function was performed by W. C. Goodall, who also presided throughout the proceedings.

The by-laws further provided that fifty members should constitute a quorum for the transaction of business at any meeting of members. It was clearly shown by the proofs in this case that less than fifty members were present at the meeting presided over by W. C. Goodall or in fact at the two meetings. It was still further provided in the by-laws that in all meetings of the members, it should be lawful for any member of the company to be represented by a properly delegated proxy, who should have full power to represent said member at said meeting and that any vote cast by such proxy for the election of any officer, of the company or on any matter coming before the meeting, should have the same weight and effect as if it had been personally cast by the member appointing such proxy. In this connection it is claimed by respondents that some 820 proxies were presented to the

not present at the meeting. The time of this meeting was
and he is now in the hospital. The only other
at that time. The only other person who
present at the meeting, and who is now in the
ing it was in the hospital. The only other
that Mr. Ladd did not attend to the meeting was
his office and it was the only one who was
to call and speak to the other one. The only
to call, however, that he was in the hospital
and this later call the first meeting was in
minutes that Mr. Ladd was in the hospital
to call the meeting to order at 1:00 p.m. The
was called by Mr. Ladd, and it was the first
the meeting.

[illegible]

credentials committee of the W. C. Goodall meeting and that therefore a quorum must be considered as present and taking part in the meeting. Some question is raised as to whether that provision in the by-laws, which states that fifty persons shall constitute a quorum for the transaction of business at any meeting of the members, that fifty persons must be present or whether any smaller number with proxies amounting to fifty or more would be sufficient. That is question, however, which it is not necessary for us to determine in this case. The officers of the meeting, were selected by a viva voce vote, and there is nothing in the record to indicate that the proxies were recognized or voted until after the organization of the meeting was perfected. But regardless of the question whether a quorum was present and voting at the organization of the assembly presided over by W. C. Goodall, that meeting was not legally organized and could not legally proceed to the election of officers, consequently respondents were not regularly elected to the offices claimed by them and could have no legal title thereto. The court below therefore properly instructed the jury to find the respondents guilty of unlawfully usurping the offices of directors of the Bankers Accident Insurance Company as alleged in the information and did not err in entering judgment of ouster on the verdict returned in conformity to such instruction.

The judgment of the court below will be affirmed.

Not to be reported in full.

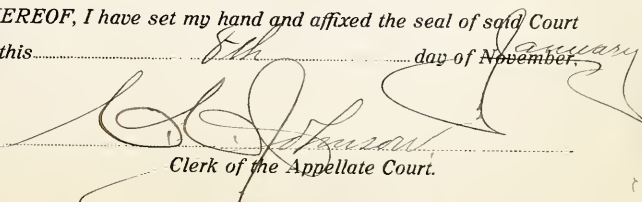
credentials committee of the A. O. U. S. A. meeting and
that therefore a person would be considered as present and
taking part in the meeting. The question is raised as to
whether that provision in the A. O. U. S. A. states that fifty
persons shall constitute a quorum for the transaction of
business at any meeting of the committee of the A. O. U. S. A.
persons shall be present or represented by a duly authorized
agent or representative to fifty or more votes in the committee.
That is question, however, which it is not necessary for
us to determine in this case. The question of the meeting
was decided by a vote of the committee, and the committee in
the record to indicate that the provision was complied with
votes until after the organization of the meeting was com-
pleted. But regardless of the question whether a quorum
was present and voting at the organization of the assembly
presented over by A. O. U. S. A., that meeting was not legally
organized and could not legally proceed to the election of
officers, consequently the election of officers was not legally
as the election of officers by the committee was not legal either
therefore. The court below therefore held that the election was
not legal and that the respondents are entitled to a writ of
the officers of directors of the company and the company
company is entitled in the election and that it is not
therefore judgment or order on the verdict returned in favor
of the respondents.

Thompson of the court below will be affirmed.

not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 8th day of January,
A. D. 1916


Clerk of the Appellate Court.

OPINION

Fee \$

.....

591 - 21989

PEOPLE ex rel. MARTIN J. QUALLEY,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

2417
203 I.A. 191

Appeal from
Circuit Court,
Cook County.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Petitioner filed his petition, amended, for a writ of mandamus, seeking to be restored to the position of detective sergeant of the police force of Chicago. To the petition the defendants interposed a demurrer, which was overruled: and judgment rendered that a writ issue as prayed for. Defendants have appealed to this court but the appellee does not appear here.

This court has had occasion several times to consider petitions of this kind, and it has been many times held that unless the petition clearly shows an ordinance creating the position in question the petitioner will not be entitled to the ^{writ} of mandamus. Among the many cases so holding are, Moon v. Mayor, 214 Ill. 40; Bullis v. City, 236 Ill. 472; People ex rel. Hickland v. City, 196 App. 48; Vaughn v. City, No. 21089, this court, opinion filed February 16, 1916, and cases cited.

~~Petitioner in the case before us does not set forth any ordinance creating the position of detective sergeant. What was said in the Hickland case, supra, with reference to the ordinances touching the position of police~~ ^{did}

~~patrolman is applicable to the instant case.~~

[The petition further alleged that on August 11, 1913, charges were made against petitioner and delivered to him; that he was charged with having been guilty of conduct unbecoming a police officer, and also wilful maltreatment of a citizen; that the trial before the Civil Service Commission was set for August 20, 1913, and that he attended upon that day, but that the Commission did not hold a session; that on September 3, 1913, in the absence of the petitioner, the trial board met and he was found guilty upon the charges made, and an order was entered that he be discharged from the police department.]

So far as appears from the petition the hearing of the charges was continued from the day first set, that is, August 11th, until September 3rd, at which time it was the petitioner's right, if he so desired, to appear and defend. In the absence of any averment to the contrary we will assume that this is what was done and that the proceedings were properly conducted.

We cannot review the findings of the Civil Service Commission upon the questions of the innocence or guilt of the petitioner. Sullivan v. Lower, 234 Ill. 21.

Petitioner was discharged from the service on September 3, 1913, but did not file his original petition for mandamus until July 1, 1914, and the present amended petition until April 17, 1915. It has been held that a delay of six months in filing such a petition amounts to laches, and that laches, when shown, is a sufficient defense. Kenneally v. City, 230 Ill. 485; Schultheis v. City, 240 Ill. 167; Clark v. City, 233 Ill. 113.

For the reasons above indicated the judgment of

patrolman in uniform to the instant case.

The petition further alleged that on August 11,

1913, charges were made against petitioner and delivered to him; that he was charged with having been guilty of conduct unbecoming a police officer, and also with maltreatment

of a citizen; that the trial before the Civil Service

Commission was set for August 20, 1913, and that he attended

upon that day, but that the Commission did not hold a session;

that on September 3, 1913, in the absence of the petitioner,

the trial board met and he was found guilty upon the charges

made, and an order was entered that he be discharged from the

police department.

It is to be noted from the petition the hearing

of the charges was continued from the day first set, that

is August 11th, until September 3rd, at which time it was

the petitioner's right, if he so desired, to appear and

be heard. In the absence of any statement to the contrary

we will assume that this is what was done and that the pro-

ceedings were properly conducted.

We cannot review the findings of the Civil Service

Commission upon the question of the innocence or guilt of

the petitioner. Willivson v. Board, 101 Ill. 371.

Petitioner was discharged from the service on

September 2, 1913, but did not file his original petition

for mandamus until July 1, 1914, and the same was returned

on petition until April 17, 1915. It has been held that a

delay of six months in filing such a petition, without any

excuse, and that such delay, when shown, is a sufficient defense.

Kennedy v. City, 225 Ill. 182; Board v. City, 225 Ill. 182.

Ill. 187; City v. City, 225 Ill. 182.

For the reasons above indicated the judgment of

the Circuit Court is reversed and the cause is remanded with directions to enter an order sustaining the demurrer of the defendants and dismissing the petition.

REVERSED AND REMANDED
WITH DIRECTIONS.

the Circuit Court is reversed and the cause is remanded
with direction to enter an order sustaining the demurrer
of the defendants and dismissing the petition.

REVEREND AND HONORABLE
WITH DUTY.

RICHARD F. LILLIS,
Defendant in Error,

vs.

CITY OF CHICAGO,
Plaintiff in Error.

203 I.A. 193

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE MCSURLEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover damages for injuries received through a defective sidewalk, upon trial by a jury had judgment for \$800.

The accident ^{was} ~~is~~ stated to have occurred on or about May 3, 1914, and the first statement of claim was filed within the year thereafter; on Jan. 15, 1916, it was stricken from the files and a new statement of claim filed. It ^{was} ~~is~~ urged that this second statement stated a new cause of action, and that at the time of filing it, the statutory limitation of one year had run.

After verdict and before judgment a third statement of claim was filed, and it is said that this presented a new issue which should have been submitted to a jury.

Neither the evidence nor the proceedings have been preserved for our review by bill of exceptions or otherwise. In this condition of the record we cannot review the actions of the court upon motions (see Mann v. Brown, 263 Ill. 394), and we must assume the sufficiency of the evidence to support the verdict under either of the three statements of claim.

However, we are of the opinion that the first statement of claim contains an imperfect statement of a cause of action, and that the second statement states the same action-

2031.1.193

Writ to
Federal Court
of Chicago.

RICHARD E. LILLIS,
Defendant in Error,
vs.
SIST OF CHICAGO,
Plaintiff in Error.

IN REMEDYING JUSTICE
BEFORE THE COURT OF THE COUNTY.

Plaintiff, bringing suit to recover damages for in-
juries received through a defective sidewalk, upon trial by a
jury had judgment for \$200.
The accident as stated to have occurred on or about
May 2, 1914, and the first statement of claim was filed within
the year thereafter; on Jan. 10, 1916, it was attacked from the
files and a new statement of claim filed. It is urged that
this second statement states a new cause of action, and that
at the time of filing it, the statutory limitation of one year
had run.

After verdict and before judgment a third state-
ment of claim was filed, and it is said that this presented
a new issue which should have been submitted to a jury.
Whether the evidence and the proceedings have been
preserved for review by bill of exceptions or otherwise.
In this condition of the record we cannot review the actions
of the court upon motions (see Wynn v. Wynn, 263 Ill. 324).
and we must assume the sufficiency of the evidence to support
the verdict unless either of the three statements of claim.
However, we are of the opinion that the first state-
ment of claim contains no impermissible statement of a cause of
action, and that the second statement states the same action.

able cause with more particularity. Under such circumstances the statute had not run against the plaintiff.

The third statement of claim did not describe a new or different tort from that alleged in the previous statements of claim. No evidence could have been introduced thereunder which would not have been admissible under either of the prior statements of claim.

There is no substantial merit in the contentions of defendant, and the judgment is affirmed.

AFFIRMED.

who came with more pertinacity. Under such circumstances

the estate had not been against the plaintiff.

The third statement of claim was not described a new

or different fact from those alleged in the previous statements

of claim. No evidence could have been introduced thereunder

which would not have been admissible under either of the prior

statements of claim.

There is no substantial merit in the contentions

of defendant, and the judgment is affirmed.

APPROVED.

88 - 22507

F. MAYER BOOT & SHOE
COMPANY,

Plaintiff in Error,

vs.

F. GRYGIERCZYK and F. LUBA,
co-partners, trading as
Grygierczyk & Luba Co.,

Defendants in Error.

203 I.A. 194

Error to

Municipal Court

Of Chicago.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on two notes executed by the defendants to the order of plaintiff, dated October 1, 1914, the first note for \$54.03, due November 20, 1914, the second note for \$54, due December 20, 1914, both drawing interest at the rate of 7 per cent. per annum from date until paid.

Upon trial by the court judgment was entered for \$29.90, which plaintiff by this writ of error seeks to have reversed, claiming that it is entitled to judgment for the full amount of the notes, with interest.

Defendants by their affidavit of defense asserted lack of consideration and also a release from all liability. The court, by entering judgment for the plaintiff, evidently found against these defenses. The defendants have assigned no cross-errors; hence the action of the court as to these defenses is not before us for review.

The defendants also asserted that they had paid the notes by making payments to an agent for the plaintiff, for which plaintiff credited these defendants on its books. We are of the opinion that the evidence does not establish the defense of payment. It appears that plaintiff was manufacturing shoes in Milwaukee, Wisconsin; that one of its agents

1914 A. 194

W. WATSON HOOT & SONS
CHICAGO, ILL.

Plaintiff in Error,

Municipal Court

vs.

City of Chicago.

E. GRAYBROOK and F. LUNA,
co-defendants, trading as
Graybrook & Luna Co.,

Defendants in Error.

MR. PHILIP J. MURPHY
PLAINTIFF THE CITY OF CHICAGO

Plaintiff brought suit on two notes executed by the
defendants to the order of plaintiff, dated October 1, 1914,
the first note for \$24.03, due November 30, 1914, the second
note for \$24, due December 30, 1914, both drawing interest
at the rate of 7 per cent. per annum from date until paid.
Upon trial by the court judgment was entered for \$29.90,
which plaintiff by this writ of error seeks to have reversed,
claiming that it is entitled to judgment for the full amount
of the notes, with interest.

Defendants by their affidavits of defense asserted
lack of consideration and also a release from all liability.
The court, by entering judgment for the plaintiff, over-
ruled the affidavits of defense. The defendants have assign-
ed no cross-motions; hence the motion of the court as to these
defenses is not before us for review.

The defendants also asserted that they had paid the
notes by making payments to an agent for the plaintiff, for
which plaintiff credited these payments on its books. We
are of the opinion that the evidence does not establish the
defense of payment. It appears that plaintiff was manu-
facturing shoes in Milwaukee, Wisconsin; that one of its agents

was a Mr. Lippert, in Chicago; that the defendants were purchasing shoes from plaintiff through its agent, Lippert; that in April, 1914, defendants received a letter from plaintiff requesting that whenever bills became due for shoes remittances should be sent direct to the plaintiff in Milwaukee, and adding: "You are to pay no money to any agent or representative of this company except on written authority." Similar notices were sent in May, June and July. In spite of these notices defendants made certain payments to Lippert aggregating \$106.52, which with interest amount to \$108. 03. This was the situation on October 1, 1914. Apparently it was brought to the attention of defendants that they had made these payments to Lippert contrary to instructions from the plaintiff, and an agreement was made which involved the execution of the two notes in question and the undertaking by defendants to recover from Lippert the money they had improperly paid to him.

These facts fail to establish the defense of payment. Defendants were clearly liable for the amount upon their account, and the postponement of payment was a good consideration to support the notes.

Plaintiff is entitled to judgment for the amount of the notes with interest, which is \$125.19. The judgment is reversed, and judgment for plaintiff will be entered in this court for \$125.19.

REVERSED AND JUDGMENT HERE.

was a Mr. Lippert, in 1914; that the defendants were pur-
chasing shares from plaintiff through the agent, Lippert; that
in April, 1914, defendants received a letter from plaintiff
requesting that whenever bills became due for those residences
should be sent direct to the plaintiff in Milwaukee, and add-
ing: "You are to pay no money to any agent or representative
of this company except on written authority." Similar notices
were sent in May, June and July. In spite of these notices
defendants made certain payments to agent aggregating \$106.52,
which with interest amount to \$108.75. This was the situation
on October 1, 1914. Apparently it was brought to the attention
of defendants that they had made these payments to Lippert con-
trary to instructions from the plaintiff, and an agreement was
made which involved the execution of the two notes in question
and the undertaking by defendants to recover from Lippert the
money they had improperly paid to him.
These facts fail to establish the defense of payment.
Defendants were clearly liable for the amount upon their ac-
count, and the postponement of payment was a good consideration
to support the notes.
Plaintiff is entitled to judgment for the amount of
the notes with interest, which is \$122.12. The judgment is
reversed, and judgment for plaintiff will be entered in this
court for \$122.12.

92 - 22512.

ANDREW JACKSON, Defendant in Error,	} 203 L.A. 196	
vs.		} Error to
WILLIAM A. BURNS, et al. (Defendants)		} Municipal Court
WILLIAM A. BURNS, Plaintiff in Error.		} of Chicago.

MR. PRESIDING JUSTICE MESURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against Burns and W. Tudor ApMadoc to recover for damages to plaintiff's automobile received in a collision caused, as plaintiff alleged, through the carelessness and improper management of defendants' respective automobiles. Upon trial by the court ApMadoc was found not guilty, Burns was found guilty, and plaintiff's damages were assessed at \$285 and judgment against Burns entered on the finding. The defendant Burns, in this court, asks that this judgment be reversed.

Two grounds for reversal are asserted - first, that the statement of claim fails to set forth a cause of action. It is not necessary to consider whether the statement is sufficient upon a motion to strike, but only whether it states a case sufficient after verdict to support the judgment. As is quoted with approval from Chitty, in C. & E. I. R. R. Co. v. Hines, 132 Ill. 161, the rule is:

"Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect,

208 T. A. 196

Plaintiff in Error,
 Defendant in Error,
 vs.
 WILLIAM A. BURNS, et al.
 (Defendants)
 WILLIAM A. BURNS,
 Plaintiff in Error.

Complained Court
 of Chicago.

THE CHIEF JUSTICE
 DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against Burns and A. Under
 to recover for damages to plaintiff's automobile
 received in a collision caused, as plaintiff alleged, through
 the carelessness and improper management of defendant's re-
 spective automobiles. Upon trial by the court plaintiff was
 found not guilty, Burns was found guilty, and plaintiff's
 damages were assessed at \$255 and judgment against Burns
 entered on the finding. The defendant Burns, in this court,
 asks that this judgment be reversed.

The grounds for reversal are asserted - first, that
 the statement of claim fails to set forth a cause of action.
 It is not necessary to consider whether the statement is un-
 sufficient upon a motion to strike, but only whether it states
 a cause sufficient after verdict to support the judgment. As
 it proved with approval from (Hitt), in Q. A. R. 1. 1. 20.
 v. Hines, 122 Ill. 181, the rule is:

"Where there is any defect, imperfection or omission
 in any pleading, whether in substance or in form, which
 would have been a fatal objection upon demurrer, yet if
 the issue joined be such as necessarily resulted, on the
 trial, from the facts so definitely or impermissibly
 stated or omitted, and without which it is not to be ex-
 sumed that either the judge would direct the jury to give
 or the jury would have given, the verdict, such defect,

2.

imperfection or omission is cured by the verdict."

And in Chicago City Ry. Co. v. Jennings, 157 Ill. 274, it is held that it is not necessary to specify the acts which constitute negligence.

Plaintiff's statement of claim alleged that Burns so negligently, recklessly and improperly ran his automobile that as a direct result thereof the automobile of ApMadoo and the automobile of plaintiff were brought into violent collision. Defendant Burns by his affidavit of defense denied that he so operated his automobile that, either directly or indirectly, he caused any other automobile to come in contact with or be the proximate cause of any collision between plaintiff's automobile and any other automobile. Defendant did not ask for a more particular statement of claim but joined issue upon the essential fact of his negligence causing the damage to plaintiff's automobile. He cannot now be heard to complain of the insufficiency of the statement of claim.

"After judgment, the rule by which pleadings before judgment are construed most strongly against the pleader is reversed and the pleading upon which the judgment is based is liberally construed for the purpose of sustaining the judgment. * * If the statement of claim filed in this cause stated a cause of action, however defectively or imperfectly, and the issue joined was such as necessarily to require proof of the facts defectively stated, it would be sufficient." Plew v. Board, 274 Ill. 232.

The second matter asserted as a ground for reversal is that the conduct and management of defendant's car was not the proximate cause of the injury. Stated briefly, the evidence tended to show that the defendant Burns came into Michigan Boulevard from a cross street at a high rate of speed, and ApMadoc's automobile, in veering away to avoid

inspection or collection is made by the vehicle.
And in California v. Col. v. Lammie, 171 Ill. 274, 14
it is said that it is not necessary to specify the exact which
constitutes negligence.

Plaintiff's statement of claim alleged that there
was negligently, recklessly and intentionally ran his automo-
bile there as a direct result thereof the automobile of
Lammie and the automobile of Plaintiff were brought into
violent collision. Defendant claims by his affidavit of
defense that he was operating his automobile last,
either directly or indirectly, he caused any other automobile
to come in contact with or be the proximate cause of any
collision between Plaintiff's automobile and any other auto-
mobile. Defendant did not sue for a more particular de-
ment of claim but joined issues upon the assumption that of
his negligence causing the damage to Plaintiff's automobile.
He cannot now be heard to complain of the insufficiency of
the statement of claim.

"It is in view of the rule by which Plaintiff's
burden was established and the fact that the burden is
in reversed and the finding upon which the judgment is
based is directly contrary to the evidence of what in-
the judgment. All the statements of claim filed in
this case stated a cause of action, however negligently
or intentionally, and the same joined was such as neces-
sarily to require proof of the facts affirmatively stated,
it would be sufficient." Lammie v. Lammie, 171 Ill. 274.

The second matter asserted as a ground for reversal
is that the contract and management of defendant's car was not
the proper cause of the injury. It was held, the evi-
dence tended to show that the defendant's car was in
Chicago transferred from a street car to a street car
speed, and Lammie's automobile, in violation of the law.

3.

Burns' automobile, collided with plaintiff's car.

We hold that defendant did more than simply cause a condition in which ApMadoc's chauffeur acted negligently. Whether or not ApMadoc's chauffeur acted with the highest degree of wisdom and judgment does not affect the fact of defendant's primary liability for his own conduct. He was responsible for starting in operation a series of events which resulted in damage to the plaintiff. In this respect the facts in this case are like those before this court in Page v. Brink's Chicago City Express Co., 192 Ill. App. 389, in which we held the defendant liable. The evidence justified the court in the conclusion that the defendant's negligent operation of his automobile was the proximate cause of the damage to plaintiff's car.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

TONY ROSETTI and VINCENT
MANNO, copartners, trading
as Tony Rosetti & Co. Labor
Agency,

Defendants in Error.

vs.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY, a corporation,
et al.,

Plaintiffs in Error.

203 I.A. 200

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit alleging that they conducted a licensed labor agency and that the defendant, Chicago, Rock Island & Pacific Railway Company, contracted with them to furnish laborers, whom defendant agreed to employ and furnish transportation. Plaintiffs furnished the men as agreed upon, but defendant failed to employ them and furnish transportation, resulting in loss to plaintiffs. Under instructions from the court the jury returned a verdict for plaintiffs in the sum of \$86 and judgment was entered thereon.

Defendant asserts that no contract was made with reference to these laborers, but to this we cannot agree. The evidence shows that an agent of the defendant at Manly, Iowa, wrote to plaintiffs that he could use "thirty Greeks at Mason City, Iowa, at once," and that transportation would be furnished by the superintendent at Chicago. To the same effect was another letter for thirty men from the superintendent at Cedar Rapids. The letters are explicit as to terms and details of employment, and constitute a contract binding upon the defendants.

2081.A. 200

COURT OF CHICAGO
 ORDER TO PRODUCE

Plaintiffs in error.
 CHICAGO, ROCK ISLAND & PACIFIC
 RAILWAY COMPANY, a corporation,
 et al.,
 vs.
 Defendants in error.
 TONY ROSETTI and VINCENT
 MANNO, co-partners, trading
 as Tony Rosetti & Co., Labor
 Agency.

DEFINITION OF THE UNION OF THE COURT.
 IN REPLYING TO THE DEFENDANT'S

Plaintiffs brought suit alleging that they
 conducted a licensed labor agency and that the defendant,
 Chicago, Rock Island & Pacific Railway Company, contracted
 with them to furnish laborers, whom defendant agreed to
 employ and furnish transportation. Plaintiff furnished
 the men as agreed upon, but defendant failed to employ
 them and furnish transportation, resulting in loss to
 plaintiff. Under instructions from the court the jury
 returned a verdict for plaintiff in the sum of \$86 and
 judgment was entered thereon.

Defendant asserts that no contract was made
 with reference to these laborers, but to this we cannot
 agree. The evidence shows that an agent of the defendant
 at Quincy, Iowa, wrote to plaintiff that he could use
 "thirty Greeks at Mason City, Iowa, at once," and that
 transportation would be furnished by the superintendent
 at Chicago. To the same effect was another letter for
 thirty men from the superintendent at Cedar Rapids. The
 letters are explicit as to terms and details of employment,
 and constitute a contract binding upon the defendant.

From the evidence the court could properly find that of the sixty men furnished by plaintiffs and tendered to defendants only seventeen were accepted and furnished transportation; forty-three were refused. Plaintiffs, as permitted by statute (act relating to private employment agencies, chap. 48 Hurd), ^(G. & A. 5322 et seq.) had collected a registration fee of two dollars from each of these laborers, which the action of the defendants in failing to keep its agreement compelled plaintiffs to return. It is argued that as the evidence tends to show that the names of these refused laborers were not actually placed on the register plaintiffs were not entitled to the registration fee. We think it is clear from the language of the statute that the names placed upon the register shall be the names of every "accepted application for employment." If defendants had complied with their agreement to take these men their names would have been placed upon the register in proper form, and plaintiffs would have been entitled to retain the two dollar registration fee as their compensation. Defendants' failure to take the men deprived plaintiffs of their compensation, and we do not see how it can avail defendants to assert that the names in fact had not yet been formally registered.

Matters urged with respect to non-compliance by plaintiffs with the requirements of the statute are not available as defenses in this suit.

No justification for defendants' failure to comply with its undertaking has been shown, and the judgment is affirmed.

AFFIRMED.

From the evidence the court could properly find that of the sixty men furnished by plaintiffs and considered to defendants only seventeen were accepted and furnished transportation; forty-three were refused. Plaintiffs, as permitted by statute (act relating to private employment agencies, chap. 48, Laws 1913), had collected a registration fee of two dollars from each of these laborers, which the action of the defendants in failing to keep the agreement compelled plaintiffs to return. It is argued that as the evidence tends to show that the names of these refused laborers were not actually placed on the register plaintiffs were not entitled to the registration fee. We think it is clear from the language of the statute that the names placed upon the register shall be the names of every accepted application for employment. If defendants had complied with their agreement to take these men their names would have been placed upon the register in proper form, and plaintiffs would have been entitled to retain the two dollar registration fee as their compensation. Defendants' failure to take the men deprived plaintiffs of their compensation, and we do not see how it can avail defendants to assert that the names in fact had not been formally registered.

Matters urged with respect to non-compliance by plaintiffs with the requirements of the statute are not available as defenses in this suit.

No justification for defendants' failure to comply with its undertaking has been shown, and the judgment is affirmed.

109 - 22532.

203 I.A. 202

CITY OF CHICAGO,)	Error to
Defendant in Error,)	
vs.)	Municipal Court
FRED SMITH,)	of Chicago.
Plaintiff in Error.)	

MR. PRESIDING JUSTICE MESURELY
DELIVERED THE OPINION OF THE COURT.

Defendant, charged with keeping a common gaming house in Chicago, was tried by the court, found guilty and fined \$50. By this writ of error he seeks to have this judgment reversed upon the ground that it is not supported by the evidence.

Plaintiff says that this court cannot consider the evidence for the reason that it has not been properly preserved for review. Upon investigation we are of the opinion that the contention of the plaintiff is valid. This is a case of the 5th class, and section 23 of the Municipal Court act prescribes how the evidence in a case of this sort shall be preserved. It may be done by a correct statement of the facts. This does not purport to be such a document, and in fact it is not. Neither is it a correct stenographic report of the proceedings at the trial; it does not purport to be a correct stenographic report nor to contain all the evidence presented upon the trial.

Even if we should consider the document before us as a stenographic report or statement of facts, there is a manifest omission from the record which would compel an affirmance. It appears that defendant was charged with having violated an

2031.A.202

CITY OF CHICAGO,	{	Defendant in Error,
vs.		
WILLIAM BAKER,		Plaintiff in Error.
of Chicago,		
Municipal Court		of Chicago.

WILLIAM BAKER, PLAINTIFF IN ERROR,
vs.
CITY OF CHICAGO, DEFENDANT IN ERROR.

Defendant, charged with keeping a common bawdy house in Chicago, was tried by the court, found guilty and fined \$50. By this writ of error he seeks to have this judgment reversed upon the ground that it is not supported by the evidence.

Plaintiff says that this court cannot consider the evidence for the reason that it has not been properly preserved for review. Upon investigation we are of the opinion that the contention of the plaintiff is valid. This is a case of the 6th class, and section 23 of the Municipal Code not prescribed nor the evidence in a case of this sort will be preserved. It may be gone by a correct statement of the facts. This does not purport to be such a statement, and in fact it is not. Neither is it a correct stenographic report of the proceedings at the trial; it does not purport to be a correct stenographic report nor to contain all the evidence presented upon the trial.

Even if we should consider the document before us as a stenographic report or statement of facts, there is a manifest omission from the record which would result in affirmance. It appears that defendant was charged with keeping a bawdy house in

2.

ordinance of the City of Chicago and was found guilty. This ordinance does not appear in any place before us in the record. Under such circumstances it is our duty to presume that the facts as to the ordinance which are omitted from the record were sufficient to justify the finding of the court. In so holding we are in accord with the decisions of this court in City v. Tearney, 187 Ill. App. 441; City v. Moran, 192 id. 57; City v. Kohn, 195 id. 399; City v. Lesser, 196 id. 37.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

ordinance of the City of Chicago was Jones Bill.
This ordinance was not passed in any form before us in
the record. Under such circumstances it is our duty to
assume that the facts as to the ordinance which are
omitted from the record were sufficient to justify the
finding of the court. In so holding we are in accord with
the decision of this court in City v. Jennings, 187 Ill.
App. 411; City v. Hoxen, 188 Ill. 41; City v. Kane, 188 Ill. 439;
City v. Lerner, 188 Ill. 47.
For the reasons indicated the judgment is affirmed.

AFFIRMED.

110 - 22533

CITY OF CHICAGO,
Defendant in Error,
vs.
TOM JONES,
Plaintiff in Error.

203 I.A. 203
ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is another case wherein the defendant was found guilty of engaging in gambling in violation of a city ordinance of Chicago.

What we have said in our opinion in City v. Smith, No. 22532, this day filed, is applicable to the instant case. The evidence has not been properly preserved for review, and even if we should examine it, the ordinance in question, of which the trial court took judicial notice and of which we cannot, has not been preserved in the record. As we have heretofore held in many cases, in the absence of the ordinance we must presume that the trial court was justified in its finding and judgment.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

2031 A. 203

ORDER TO REINSTATE COURT
OF RECORDS

City of Chicago,
Defendant in Error,
vs.
New Jones,
Plaintiff in Error.

THE HONORABLE JUSTICE ROBERT

DELIVERED THE OPINION OF THE COURT.

This is another case wherein the defendant was found guilty of engaging in violation of a city ordinance of Chicago.

What we have said in our opinion in City v.

Smith, No. 22323, this day filed, is applicable to the

instant case. The evidence has not been properly pre-

served for review, and even if we should examine it,

the ordinance in question, of which the trial court took judicial notice and of which we cannot, has not been pre-

served in the record. As we have heretofore held in many

cases, in the absence of the ordinance we must presume

that the trial court was justified in its finding and

judgment.

For the reasons indicated the judgment is

affirmed.

APPROVED.

WALTER RUTKOWSKI by MARY
LANDOWSKI, next friend,
Defendant in Error.

vs.

CARL MARCOWSKA,
Plaintiff in Error.

Error to

Municipal Court

of Chicago.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging malicious prosecution and false imprisonment. Statement of claim was filed October 25, 1915, and summons issued. On November 1, 1915, default was entered against the defendant for failure to enter his appearance. On November 8th, before a hearing and judgment were had, defendant filed his appearance, and on the 10th an affidavit of defense. On December 21st, without notice to the defendant, the trial court entered an order striking the appearance and affidavit of defense from the files, and the case was tried by a jury in the absence of the defendant or his attorney. Verdict was returned assessing plaintiff's damages in the sum of \$500, and judgment was entered on the verdict. Defendant contends in this court that the judgment must be reversed for the reason that the statement of claim filed by the plaintiff does not state a cause of action.

In an action to recover damages for malicious prosecution it is essential to allege, among other things, the absence of probable cause and the termination of the original proceedings in favor of the plaintiff. Daily v. Donath, 100 Ill. App. 52; Wicker v. Hotchkiss, 62 Ill. 107. Neither of these allegations is made by the plaintiff in the statement before us.

Gillman v. Chicago Rys. Co., 268 Ill. 305, is authority for holding that in a case of this sort the defendant is not bound to answer a claim which does not show any liability

2031.A.204

WALTER HUNTER by MARY
 LAMONT, next friend,
 Defendant in error,
 vs.
 CARL MARSHALL,
 Plaintiff in error.

Order to
 Criminal Court
 of Chicago.

IN REMOVAL PROCEEDINGS
 HELD AND DECIDED BY THE COURT.

Plaintiff brought this alleging malicious prosecution
 and false imprisonment. Statement of claim was filed October
 22, 1915, and summons issued. On November 1, 1915, defendant
 was entered against the defendant for failure to enter his
 appearance. On November 8th, before a hearing and judgment
 were had, defendant filed his appearance, and on the 10th an
 affidavit of defense. On December 1st, without notice to the
 defendant, the trial court entered an order striking the ap-
 pearance and affidavit of defense from the files, and the
 case was tried by a jury in the absence of the defendant or his
 attorney. Verdict was returned assessing plaintiff's damages
 in the sum of \$500, and judgment was entered on the verdict.
 Defendant contends in this court that the judgment must be re-
 versed for the reason that the statement of claim filed by the
 plaintiff does not state a cause of action.

In an action to recover damages for malicious prosecu-
 tion it is essential to allege, among other things, the absence
 of probable cause and the falsification of the original proceedings
 in favor of the plaintiff. Wick v. Barlow, 100 Ill. App. 221;
Wick v. Barlow, 22 Ill. 107. Neither of these allegations
 is made by the plaintiff in the statement before us.
Wick v. Barlow, 22 Ill. 107, is author-
 ity for holding that in a case of this sort the defendant is
 not bound to aver a cause which does not show any liability

against him, and hence cannot be in default. This case is also authority for holding, as we do, that the statement before us is fatally defective by reason of the omission of the essential allegations above referred to. This same case is also authority for holding that this insufficiency of the statement was not waived by the failure of the defendant to move for a more specific statement. In the opinion the court says: "The statement stands for a declaration in common law actions. It is essential to sustain the judgment. The rule is well settled that if a declaration is so defective that it will not sustain a judgment the insufficiency may be availed of on a writ of error even after a demurrer overruled and a plea to the merits."

It follows from what we have said that the judgment must be reversed, and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT HERE.

...and that, and have shown to be in fact. This case is
also authority for the fact, as we do, that the statement in
fact is fatally defective by reason of the omission of the
essential allegations above referred to. This case is
also authority for holding that this insufficiency of the state-
ment was not waived by the failure of the defense to move
for a more specific statement. In the opinion the court says:
"The statement stands for a declaration in common law actions.
It is essential to sustain the judgment. The rule is well
settled that if a declaration is so defective that it will not
sustain a judgment the insufficiency may be availed of as a
basis of error even after a verdict returned and a plea for
the verdict."
It follows from what we have said that the judgment
must be reversed, and judgment of affirmance is entered in
this court.

REVEREND AND TRUSTED MRS.

RAY F. DELONG and JAMES
F. COLLINS

Appellees.

vs.

THOMAS J. HRUBY,

Appellant.

203 I.A. 206

APPEAL FROM COUNTY COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit against defendant and upon trial had judgment for \$500, from which defendant has appealed.

This appeal should be dismissed for the reason that defendant has not filed a proper abstract of the record. What purports to be an abstract is merely an index. ^{was} The declaration ~~is~~ merely described as "Harr. Filed by and in name of Ray F. DeLong alone. Common counts, unverified." Then follows: "Pleas of defendant, 1st, General issue; second, On July 2, 1914, plaintiff by his deed bearing date of that day, released defendant. Affidavit of meritorious defense." ^{There were also} Similar other deficiencies in the abstract ^{might be quoted.} See notable opinion by Mr. Justice Gary in Bishop v. Loewus, 63 Ill. App. 351. In the absence of a sufficient abstract of the record the judgment must be affirmed.

Another conclusive reason for affirmance lies in the fact that all of the evidence introduced upon the trial is not before us in the record. A set of plans and a written document which were introduced in evidence are omitted from the bill of exceptions. We learn from the statement of counsel that plaintiffs' suit was to

203 I.A. 206

ALLIANCE WITH COUNTY COURT,
COOK COUNTY.

RAY T. DELMONO and LEMAS
vs.
THOMAS J. HENRY,
Appellant.

MR. JUSTICE JUSTICE HENRY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant and upon trial had judgment for \$500, from which defendant has appealed.

This appeal should be dismissed for the reason that defendant has not filed a proper statement of the record. That purports to be an abstract is merely an index. The description is merely described as "Ray T. Delmono and Lemas vs. Thomas J. Henry, Appellant." Then follows: "Issues of defendant, unanswered." Then follows: "Issues of defendant, unanswered; second, on July 2, 1914, and, last, General issue; second, on July 2, 1914, plaintiff by his last hearing date of that day, released defendant. Affidavit of meritorious defense." Similar other deficiencies in the abstract might be quoted. See notable opinion by Mr. Justice Gray in Wishon v. Lewis, 63 Ill. App. 321. In the absence of a sufficient abstract of the record the judgment must be affirmed.

Another conclusive reason for affirmance lies in the fact that all of the evidence introduced upon the trial is not before us in the record. A set of facts and a written document which were introduced in evidence are omitted from the bill of exceptions. We learn from the statement of counsel that plaintiff's suit was to

recover a balance of \$500 of a deposit of \$1,500 made by them with defendant under an agreement for a lease of a building to be erected by the defendant. Plaintiffs introduced evidence tending to show that this agreement was canceled by mutual consent of all the parties, including the defendant, who agreed to refund to plaintiffs the deposit money; that \$1,000 of the same was paid and that defendant agreed to pay the balance of \$500 either in cash or by conveying a lot to plaintiffs; that the defendant failing to give the lot, plaintiffs were entitled to recover the balance of the deposit money. In the absence of a complete bill of exceptions showing all of the testimony and evidence submitted to the jury, we must presume that the jury was justified from the evidence in finding that plaintiffs had established their claim. Therefore, even if we had before us a proper abstract, the judgment should be affirmed.

AFFIRMED.

recover a balance of \$500 of a deposit of \$1,500 made by
 them with defendant under an agreement for a lease of a
 building to be erected by the defendant. Plaintiff in-
 produced evidence tending to show that this agreement
 was cancelled by mutual consent of all the parties, in-
 cluding the defendant, who agreed to refund to plaintiff
 the deposit money; that \$1,000 of the same was paid and
 that defendant agreed to pay the balance of \$500 either
 in cash or by conveying a lot to plaintiff; that the
 defendant failing to give the lot, plaintiff was en-
 titled to recover the balance of the deposit money. In the
 absence of a complete bill of exceptions showing all of the
 testimony and evidence submitted to the jury, we must pre-
 sume that the jury was justified from the evidence in find-
 ing that plaintiff had established their claim. Therefore,
 even if we had before us a proper statement, the judgment
 should be affirmed.

AFFIRMED.

OWEN KELLY,
Defendant in Error,
vs.
GREAT LAKES DREDGE & DOCK
COMPANY, a corporation,
Plaintiff in Error.

203 I.A. 207

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant brings this writ of error to review a judgment against it of \$488.20 entered on the finding of the trial Judge, to whom the cause was submitted by the agreement of the parties.

Plaintiff alleges in his statement of claim that he was a "caisson worker and digger" and that defendant, through its accredited representative, agreed to give him employment as such worker and digger for one year at a wage of \$37.95 per week, and that he continued in such employment until December 21, 1914, when he was discharged without cause. He claimed as damages the difference between what he received under the contract and was otherwise able to earn during the contract period and the sum he would have received at the contract rate but for his discharge, amounting to \$494.20. Defendant in its affidavit of meritorious defense denied the making of the contract alleged. Plaintiff testified that he made his contract of employment with William Murphy, the superintendent of defendant, whom plaintiff called as a witness under Section 33 of the Municipal Court Act; that on or about October 6, 1914, he, with other men, had a conversation with Murphy in which all the men told Murphy that they wanted to find

203 I.A. 207

IN RE: JAMES H. HARRIS

vs.

JOHN J. HARRIS, Plaintiff in Error,
vs.
JOHN J. HARRIS, Defendant in Error.

THE COURT HEREBY ORDERED THAT THE VERDICT BE

Set aside and a new trial granted. The court further ordered that the costs of the trial be paid by the defendant. The court also ordered that the plaintiff be awarded interest on the sum of \$100.00 at the rate of 6% per annum from the date of the trial until the same is paid.

The plaintiff alleged in his statement of claim that he was a "colored worker and singer" and that defendant, through its authorized representative, agreed to give him employment at such work and singer for one year at a wage of \$37.50 per week, and that he continued in such employment until December 31, 1914, when he was discharged without cause. He claimed as damages the difference between what he received under the contract and what he would have received had the contract been performed. He also claimed for the cost of his transportation to and from the place of employment.

Defendant in its answer denied the plaintiff's allegations and claimed that the plaintiff was not entitled to the wages claimed. It also claimed that the plaintiff was not entitled to the cost of his transportation. The court found in favor of the plaintiff and awarded him the sum of \$100.00 with interest.

out about organizing a "branch of the union" for themselves; that they were "up against" the union, and that Murphy said, "If you will stay with me I will stick with you. I will guarantee you a year's work without a cut of wages." Whereupon Mike Dolan and Peter Merren answered, "Enough said," and Dolan shook hands with Murphy. There had theretofore been a strike of the Hod Carriers' Union, in which plaintiff was involved and "went out" with the other union men, but subsequently returned; and it was to guard against union disfavor that plaintiff and others had the talk with Murphy which resulted in the contract which plaintiff seeks to enforce against defendant. At the time of this talk plaintiff was receiving \$4.60 per day, which was the union scale. Other witnesses corroborated plaintiff's version of the contract. Waiving the dispute as to Murphy's authority to make the contract sought to be enforced, and not disputing what Kelly and the other man testified to took place between Kelly, the other men and Murphy, the questions remain - Did it amount to an enforceable contract? Is it a bilateral or a unilateral agreement? In law, were both sides to the contract bound or only one? We cannot say that the agreement, claimed to exist by virtue of the words and actions of the parties as related by the several witnesses, contained mutual or reciprocal conditions. The men were not bound; according to their own version they could quit working for defendant at any time they saw fit. They were before and at the time of the talk above recited working for defendant by the day and were paid for each day's work. They were never paid for days which they did not work and many days they were laid off because of weather conditions. We hold that the agreement sought to be en-

ent about organizing a "branch of the union" for the purpose of
 that they were "up against" the union, and that they were
 "If you will stay with me I will stick with you. I will
 guarantee you a year's work without a cent of wages." Where-
 upon the union and later letters answered, "Enough said."
 and Dolan shook hands with Murphy. There had heretofore
 been a strike of the Hob Carriers' Union, in which plain-
 tiff was involved and "went out" with the other union men,
 but subsequently returned; and it was to guard against
 union disavow that plaintiff and others had the talk with
 Murphy which resulted in the contract which plaintiff seeks
 to enforce against defendant. At the time of this talk
 plaintiff was receiving \$4.50 per day, which was the union
 scale. Other witnesses corroborated plaintiff's version
 of the contract. Waiving the dispute as to Murphy's
 authority to make the contract sought to be enforced, and
 not disputing that Kelly and the other men testified to
 took place between Kelly, the other men and Murphy, the
 questions remain - Did it amount to an enforceable contract?
 Is it a bilateral or a unilateral agreement? In law, were
 both sides to the contract bound or only one? We cannot
 say that the agreement, claimed to exist by virtue of the
 words and actions of the parties as related by the several
 witnesses, contained mutual or reciprocal obligations. The
 men were not bound; according to their own version they
 could quit working for defendant at any time and see fit.
 They were before and at the time of the talk above related
 varying for defendant by the day and were paid for each
 day's work. They were never paid for days when they did
 not work and many days they were laid off because of weather
 conditions. We hold that the agreement sought to be en-

forced is unilateral, lacks mutuality, and is consequently unenforceable. Cincinnati Exhibition Co. v. Johnson, 190 Ill. App. 630; Ulrey v. Keith, 237 Ill. 284.

The judgment of the Municipal Court is reversed and a judgment of nil capiat and for costs will be entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT
AND FOR COSTS ENTERED HERE.

located in the town, Jacob's Brewery, and is consequently
unavailable. Municipal Commission No. 10. v. Township, 190
III. App. 630; City v. State, 187 Ill. 284.

The judgment of the Municipal Court is reversed
 and a judgment of nil costs and for costs will be entered
 in this court.

REVEREND AND HONORABLE OF THE JUDGE
 AND THE COSTS REVEREND JUDGE.

MINNA SPRENGEL,
Defendant in Error,

vs.

ARTHUR SCHROEDER, Administrator
de bonis non with the will an-
nexed of the Estate of HENRY
HOCHBAUM, deceased,
Plaintiff in Error.

203 I.A. 213

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for re-
view the record of the trial of this cause in the Superior
court terminating in a judgment entered upon the verdict
of a jury after the overruling by the trial Judge of mo-
tions for a new trial and in arrest of judgment of \$4000.
to be paid in due course of the administration of the
testator's estate.

The accident to plaintiff, damages for which
are sought to be recovered in this action, happened by her
falling through a trap door left open by defendant's
testator. The declaration consists of two counts, in the
first of which Henry Hochbaum was alleged to be in "possession
and control" of the building of which the trap door was a
part, and that plaintiff's husband was a tenant in said
building, where plaintiff and her family resided; that
Hochbaum negligently caused a certain trap door in the
sidewalk in front of said premises to be and remain open,
rendering said sidewalk not reasonably safe for plaintiff
and others going to and from the tenements in said building,
and that plaintiff while exercising ordinary care and caution
on her part stepped into said trap door left open by reason

2021 A. 213

COMMON TO SOUTHERN COURT
OF COCK COUNTY.

LINA BREWER,
Defendant in Error,

vs.

ARTHUR SCHROEDER, Administrator
of the Estate of HENRY
SCHROEDER, deceased,
Plaintiff in Error.

MR. JUSTICE HOLCOM DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for re-

view the record of the trial of this case in the Superior
court terminating in a judgment entered upon the verdict
of a jury after the overruling by the trial judge of mo-
tions for a new trial and in arrest of judgment of \$4000.
to be paid in due course of the administration of the
testator's estate.

The accident to plaintiff, damages for which

are sought to be recovered in this action, happened by her

falling through a trap door left open by defendant's

testator. The declaration consists of two counts, in the

first of which Henry Schroeder was alleged to be in "possession

and control" of the building of which the trap door was a

part, and that plaintiff's husband was a tenant in said

building, where plaintiff and her family resided; that

Schroeder negligently caused a certain trap door in the

sidewalk in front of said premises to be and remain open,

rendering said sidewalk not reasonably safe for plaintiff

and others going to and from the premises in said building,

and that plaintiff while exercising ordinary care and caution

on her part stepped into said trap door left open by reason

of Hochbaum's negligence, and fell, receiving severe bodily injuries, internal, external, permanent and otherwise, etc. The second count ^{was} ~~is~~ similar to the first, but alleged that plaintiff was a tenant of Hochbaum. To this declaration three pleas were filed - one the general issue, the second denying that Hochbaum owned or controlled the premises of which the trap door was a part, and the third denying that Hochbaum left open the trap door, etc.]

On motion the second and third pleas were stricken from the files. The exception to the court's action in so doing is found in the record and not in the bill of exceptions. While the two pleas so stricken were properly stricken, the matters denied therein stood sufficiently denied in law by the plea of the general issue, and were therefore superfluous pleadings. Furthermore, the exception to the court's action cannot be availed of because it is not preserved in the bill of exceptions. Plaintiff likewise excepted to the ruling of the court in overruling the motion for a new trial and in arrest of judgment and in entering judgment upon the verdict. These exceptions are found in the record but not in the bill of exceptions, where they belong; they are in the wrong place and cannot therefore be availed of upon review. Mann v. Brown, 263 Ill. 394.

We might rest here and affirm the judgment, but we will not do so without passing upon the merits of the claim and the correctness of procedure, both of which defendant challenges by assignment of errors and in argument.

It is admitted that plaintiff had at the time of the action occupied the premises for sixteen years, and it is proven by evidence which is not denied that plaintiff

of Hochbaum's negligence, and fell, receiving severe bodily injuries, internal, external, permanent and otherwise, etc. The second count is similar to the first, but alleges that

plaintiff was a tenant of Hochbaum. To this declaration three pleas were filed - one the general issue, the second denying that Hochbaum owned or controlled the premises of which the trap door was a part, and the third denying that Hochbaum left open the trap door, etc.

On motion the second and third pleas were

stricken from the files. The exception to the court's action in so doing is found in the record and not in the bill of exceptions. While the two pleas so stricken were properly stricken, the matters denied therein stand sufficiently denied in law by the plea of the general issue, and were therefore superfluous pleadings. Furthermore, the exception to the court's action cannot be availed of because it is not preserved in the bill of exceptions. Plaintiff likewise objected to the ruling of the court in overruling the motion for a new trial and in arrest of judgment and in entering judgment upon the verdict. These exceptions are found in the record but not in the bill of exceptions, and they belong; they are in the wrong place and cannot therefore be availed of upon review. Winn v. Brown, 223 Ill. 324.

We might rest here and allow the judgment, but

we will not do so without passing upon the merits of the claim and the correctness of procedure, both of which defendant challenges by assignment of errors and in argument. It is admitted that plaintiff had at the time

of the action occupied the premises for sixteen years, and it is proven by evidence which is not denied that plaintiff

had paid to Hochbaum rent which Hochbaum received as such. It was not necessary to prove title in Hochbaum, as that was not made an issue by the pleading.

It is alleged and proven that Hochbaum was in possession and control of the premises and that he negligently caused the offending trap door to be open at the time of the accident, when it should have been closed. The relation of the parties was that of landlord and tenant, and the duty of Hochbaum was the duty which a landlord owes to his tenant - to keep that portion of the premises which remained in his control and which was used in common by his tenants in a reasonably safe condition, and failure to do so involves the landlord in a liability for resulting injuries, where the injured person is in the exercise of ordinary care for his or her own safety. The trap door led to a portion of the premises used in common by the tenants and of which Hochbaum retained control. Payne v. Irwin, 144 Ill. 482.

The plea of the general issue admitted ownership and control. Carlson v. Johnson, 263 Ill. 556.

We think the evidence establishes that plaintiff was in the exercise of due care for her own safety at the time of the accident, as the law did not require her to be on the lookout for open trap doors, notwithstanding the fact may be that she knew of the existence of such trap door. Whether or not she was negligent in not observing that the trap door was open was a question of fact for the jury, and with their finding we have no disposition to interfere.

Defendant urges that the counts in the declaration are inconsistent in alleging in the one that plaintiff and in the other that her husband was the tenant of Hoch-

had paid to Hochbaum rent which Hochbaum received as usual.

It was not necessary to prove title in Hochbaum, as that

was not made an issue by the pleading.

It is alleged and proven that Hochbaum was in

possession and control of the premises and that he negli-

gently caused the offending trap door to be open at the time

of the accident, when it should have been closed. The rela-

tion of the parties was that of landlord and tenant, and the

duty of Hochbaum was the duty which a landlord owes to his

tenant - to keep the portion of the premises which remained

in his control and which was used in common by his tenants

in a reasonably safe condition, and failure to do so in-

volves the landlord in a liability for resulting injuries,

where the injured person is in the exercise of ordinary care

for his or her own safety. The trap door led to a portion

of the premises used in common by the tenants and of which

Hochbaum retained control. Wynn v. Irwin, 144 Ill. 488.

The plea of the general issue and that of owner-

ship and control. Carlson v. Johnson, 163 Ill. 526.

We think the evidence established that plain-

tiff was in the exercise of due care for her own safety at

the time of the accident, as the law did not require her to

be on the lookout for open trap doors, notwithstanding the

fact that she knew the existence of such trap door.

Whether or not she was negligent in not observing that the

trap door was open was a question of fact for the jury, and

with their finding we have no disposition to interfere.

Defendant urges that the counts in the complaint

tion are inconsistent in alleging in the one that plaintiff

and in the other that her husband was the tenant of Hoch-

baum. This is permissible under well settled rules of pleading, and it was proper that the cause should go to the jury under both of such counts, as the plaintiff was not required to elect on which of the counts she would rest her case. Luken v. L. S. & M. S. Ry. Co., 154 Ill. App. 550.

The proof shows that plaintiff as a result of falling through the trap door suffered an impacted fracture of the femur, with resultant permanent shortening of the leg and consequent disability, and defendant argues that such proof is not admissible under the averment in the declaration that plaintiff "received severe bodily injuries, internal, external, permanent and otherwise, which have from that time and will, for the rest of her life disable her from attending to her affairs and business," etc. We think this averment sufficient to admit proof of the injury suffered in this case by the fracture of the femur. City v. McLean, 133 Ill. 148. The averment is not specific but general, and is in this regard distinguishable from O'Connor v. Prendergast, 99 Ill. App. 531. An impacted fracture of the femur is, we think, clearly embraced within the averment that plaintiff suffered, among others, internal injuries. There was nothing in this averment to mislead defendant or to lead defendant to suppose that recovery was sought for any particularly named injury, as in the Prendergast case, supra; but, on the contrary, without asking for a bill of particulars or a more specific averment of particular injuries suffered, defendant must be held ready to meet any injury suffered which fairly comes within the meaning of the general words used in designating such injuries. As said in Fitzgerald v. City of Chicago, 144 Ill. App. 462, "We are of opinion that the averments of the declaration are broad

baum. This is permissible under well settled rules of pleading, and it was proper that the case should go to the jury under both of such counts, as the plaintiff was not required to elect on which of the counts she would rest her case. Linker v. L. S. & W. Co., 124 Ill. App. 530.

The proof shows that plaintiff as a result of falling through the trap door suffered an impacted fracture of the femur, with resultant permanent shortening of the leg and consequent disability, and defendant argues that such proof is not allowable under the averment in the declaration that plaintiff "received severe bodily injuries, internal, external, permanent and otherwise, which have from that time and will for the rest of her life disable her from attending to her affairs and business," etc. We think this averment sufficient to admit proof of the injury suffered in this case by the fracture of the femur. City v. Hoffman,

133 Ill. 143. The averment is not specific but general, and is in this regard distinguishable from Donnan v. Frederick, 99 Ill. App. 531. An impacted fracture of the femur is, we think, clearly enough within the averment that plaintiff suffered, among others, internal injuries. There was nothing in this averment to disbar defendant or to lead defendant to suppose that recovery was sought for any particularly named injury, as in the Frederick case, and, but, on the contrary, without asking for a bill of particulars or a more specific averment of particular injuries suffered, defendant may be held ready to meet any injury suffered which fairly comes within the meaning of the general words used in declaration and injuries. As said in Linker v. City of Chicago, 144 Ill. App. 433. The use of opinion that the averments of the declaration are broad

enough to make the testimony admissible," and the court did not err in refusing on defendant's motion to strike out the testimony regarding the fractured femur. The averment that plaintiff suffered from "external and internal injuries" is sufficiently broad to include any bodily injury of whatever character resulting from the accident about which plaintiff complained. L. S. & M. S. Ry. Co. v. Ward, 135 Ill. 511.

The hypothetical question put to plaintiff's attending physician stated the material facts fairly, no fact being omitted which was material, and no such omission was pointed out by the defendant when the objection was made, but on the contrary the objection to the question was made on the ground of omitted facts; but counsel when asked to specify any omitted fact failed to do so or to specify any fact omitted or any statement in such question which was not justified. Under the ruling in City of Alledo v. Honeyman, 208 Ill. 415, defendant cannot now be heard to complain that the hypothetical question was improper. Nor is there any force in the contention that the answer of this physician in any way invaded the province of the jury. While this witness gave his opinion upon the hypothetical question put to him, it still remained for the jury to determine the facts in evidence, including the probative value of the answer to the hypothetical question, and to test the weight of such evidence by the same rules as that of any other witness. In the Honeyman case supra the rule here applicable is thus stated:

"The rule applicable to hypothetical questions is, that the party seeking the opinion of the expert may, within reasonable limits, put his hypothetical case as he claims it has been proven and take the opinion of the witness thereon, leaving the jury to determine whether the case, as put, is the one proven."

Neither the question nor answer in dispute

enough to make the testimony admissible," and the court did not err in refusing on defendant's motion to strike out the testimony regarding the fractured femur. The event that plaintiff suffered from "external and internal injuries" is sufficiently broad to include any bodily injury of whatever character resulting from the accident about which plaintiff complained. I. S. E. v. S. H. Co. v. Ward, 135 Ill. 511.

The hypothetical question put to plaintiff's

attending physician stated the material facts fairly, no fact being omitted which was material, and no such omission was pointed out by the defendant when the objection was made, but on the contrary the objection to the question was made on the ground of omitted facts; and counsel when asked to specify any omitted fact failed to do so or to specify any fact omitted or any statement in such question which was not justified. Under the ruling in City of Alheda v. Honeyman, 203 Ill. 415, defendant cannot now be heard to complain that

the hypothetical question was improper. Nor is there any force in the contention that the answer of this physician in any way invaded the province of the jury. While this witness gave his opinion upon the hypothetical question put to him, it still remained for the jury to determine the facts in evidence, including the probative value of the answer to the hypothetical question, and to test the weight of such evidence by the same rules as that of any other witness. In the Honeyman case again the rule here applicable is thus

stated:

"The rule applicable to hypothetical questions is, that the party seeking the opinion of the expert may, within reasonable limits, put his hypothetical case as he claims it has been proven and take the opinion of the witness thereon, leaving the jury to determine whether the case, as put, is one proven."

Neither the question nor answer in dispute

infringes the rule quoted.

There are no reversible errors in the instructions complained about. It is not reversible error to instruct the jury that the plaintiff is entitled to recover if they find defendant guilty of the negligence "charged in the declaration" where the jury was also told, as a condition precedent to a finding against defendant, that they must find that the plaintiff was at and prior to the time of the accident in the exercise of due care for her own safety. Springfield v. Boiler Co., 222 Ill. 355; Krieger v. A. E. & C. R. R. Co., 242 *ibid.* 544.

The modification of defendant's third instruction was inartificial and made it a little involved; nevertheless, all the instructions considered, the error, if error there was, is not so vital as to justify the award of a new trial.

The original defendant in the suit, Henry Hochbaum, died. His widow was appointed executrix of his will and estate and was on motion substituted as defendant, in his place. Before trial she died, whereupon the present defendant, as administrator de bonis non with the will annexed was substituted in place of the deceased executrix, and it is contended that the suit abated at the time of the death of the executrix. Such contention is based upon the fact that there is no statutory provision for the substitution of a personal representative upon the death of one originally appointed, and that therefore there can be no such substitution. Counsel submit no authority to support such contention, and we will assume that the only reason for the lack of such citation is that none can be found; we are not aware of any. Substitution of a personal representative for a

infringes the rule quoted.

There are no reversible errors in the instructions complained about. It is not reversible error to instruct the jury that the plaintiff is entitled to recover if they find defendant guilty of the negligence "changed in the declaration" where the jury was also told, as a condition precedent to a finding against defendant, that they must find that the plaintiff was at and prior to the time of the accident in the exercise of due care for her own safety.

Prinzie v. R. R. Co., 229 Ill. 355; Kirker v. A. A.

A. G. R. R. Co., 249 Ill. 541.

The modification of defendant's third instruction was immaterial and made it a little involved; nevertheless, all the instructions considered, the error, if error there was, is not as vital as to justify the award of a new trial.

The original defendant in the suit, Henry Hochbaum, died. His widow was appointed executrix of his will and estate and was on motion substituted as defendant in his place. Before trial she died, whereupon the present defendant, as administrator of her estate, was substituted in place of the deceased executrix, and it is contended that the suit failed at the time of the death of the executrix. Much contention is based upon the fact that there is no statutory provision for the substitution of a personal representative upon the death of one originally appointed, and that therefore there can be no such substitution. Counsel asserts no authority to support such contention, and we will assume that the only reason for the lack of such citation is that none can be found; we are not aware of any. Substitution of a personal representative for a

deceased representative must be treated in the same light and have the same force and effect as the original appointment. That the action survives is not in dispute; consequently it follows that the suit can be prosecuted against the estate while such estate is in due course of administration. There is no merit in the contention that the action abated.

It is also insisted that the damages are excessive. The amount of damages was largely a matter for the jury, and as there is nothing in the record which would warrant our finding that prejudice or passion is an element of the verdict, we have no right to disturb it. Furthermore, we think the damages awarded are no more than compensatory for the injuries suffered.

The judgment of the Superior Court is affirmed.

AFFIRMED.

deceased representative must be treated in the same light
and have the same force and effect as the original ap-
pointment. That the action survives is not in dispute; con-
sequently it follows that the suit can be prosecuted against
the estate if such estate is in the course of administra-
tion. There is no merit in the contention that the action
is barred.

It is also insisted that the contract was an-
nual. The number of damages was largely a matter for the
jury, and as there is nothing in the record which would war-
rant the finding that the contract was an annual one
the verdict, we have no right to disturb it. Furthermore,
we think the damages awarded are no more than compensatory
for the injuries suffered.

The judgment of the superior court is affirmed.

APPROVED.

GOOD PRODUCTS COMPANY,
a corporation,
Defendant in Error,
vs.
JAMES J. DWYER,
Plaintiff in Error.

203 I.A. 217

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for \$86.90 on a trial before the court, and defendant seeks this review.

The facts are not in dispute. The whole dispute centers about a settlement evidenced by a release in writing and the legal effect of that document. The parties and one Gustav Hochstadter had dealings together in virtue of some building operations under a contract between defendant and Hochstadter, which eventuated in this suit. While the suit was pending Hochstadter settled and compromised with plaintiff and took from it a written release. The matters in dispute had theretofore been arbitrated by agreement between plaintiff and Hochstadter. After Hochstadter made the settlement the suit was dismissed as to him but was prosecuted against defendant Dwyer. The release set up in defendant's affidavit of meritorious defense executed by plaintiff and received in evidence on the trial releases, in consideration of \$350 received from Hochstadter, all claims growing out of a certain contract between Hochstadter and defendant, and acknowledges full payment and satisfaction of all claims which plaintiff had against Hochstadter covering the matters in this suit. The claim of plaintiff against Hochstadter arose out of the contract between defendant Dwyer

2081 A. 217

THE COURT OF APPEALS
OF THE DISTRICT OF COLUMBIA

GEORGE H. HARRIS COMPANY,
a corporation,
Defendant in Error,
vs.
JAMES J. DUFFY,
Plaintiff in Error.

THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Plaintiff had judgment for \$88.00 on a trial be-
fore the court, and defendant seeks this review.
The facts are not in dispute. The whole dis-
pute centers about a settlement advanced by a release in
writing and the legal effect of said document. The parties
and one Gustav Hochstadter had dealings together in virtue
of some building operations under a contract between defen-
dant and Hochstadter, which eventuated in this suit. While
the suit was pending Hochstadter settled and compromised
with plaintiff and took from it a written release. The
matters in dispute had theretofore been arbitrated by arbi-
ters between plaintiff and Hochstadter. After Hochstadter
made the settlement the suit was dismissed as to him but was
prosecuted against defendant alone. The release set up in
defendant's affidavit of justification was executed by
plaintiff and received in evidence on the trial release.
In consideration of \$500 received from Hochstadter, all
claims growing out of a certain contract between Hochstadter
and defendant, and whatsoever full payment and satisfaction
of all claims which plaintiff had against Hochstadter over-
ing the matters in this suit. The claim of plaintiff against
Hochstadter arose out of the contract between defendant and

and Hochstadter. The release to Hochstadter by plaintiff settled the controversy between the parties here and Hochstadter, all of whom, at the time of the making of the settlement and the delivery of the release, were parties to this suit. The claim in controversy was for an unliquidated amount and was therefore the subject of accord and satisfaction. The settlement with Hochstadter operated as a settlement of the entire controversy by extinguishing the whole claim, and such settlement enured to the benefit of defendant.

Where an honest dispute exists a settlement made by a creditor with one of two debtors jointly liable, will, regardless of the knowledge of or participation in such settlement of the other party, enure to the benefit of such non-participating debtor. In brief, satisfaction of a debt by one of two joint debtors discharges the obligation of both, and, by parity of reasoning, the release in evidence discharged the debt in suit. Leafgreen v. Telford, 169 Ill. App. 582; State v. Story, 57 Miss. 738. The doctrine applicable here is correctly stated in 1 Cyc.318, thus:

"Accord and satisfaction with one of several plaintiffs or joint creditors is a complete extinction of the claim and is a good accord and satisfaction without showing that the one who made the settlement had authority from the others to do so."

The settlement made by Hochstadter with plaintiff worked an accord and satisfaction and discharged the claim in suit. The trial Judge should have proceeded no further after such condition was disclosed.

The judgment of the Municipal Court is reversed and a judgment of nil capiat and for costs entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT

AND FOR COSTS.

and Hochstetler. The release to Hochstetler by plaintiff settled the controversy between the parties here and Hochstetler, all of whom, at the time of the making of the settlement and the delivery of the release, were parties to this suit. The claim in controversy was for an unpaid indebted amount and was therefore the subject of record and satisfaction. The settlement with Hochstetler operated as a settlement of the entire controversy by extinguishing the whole claim, and such settlement ensured to the benefit of defendant.

Where an honest dispute exists a settlement made by a creditor with one of two debtors jointly liable, regardless of the knowledge of or participation in such settlement of the other party, ensures to the benefit of such non-participating debtor. In brief, satisfaction of a debt by one of two joint debtors discharges the obligation of both, and, by parity of reasoning, the release in evidence discharged the debt in suit. Levinson v. Telford, 122 Ill. App. 582; State v. Story, 57 Miss. 730. The doctrine applicable here is correctly stated in 1 Cyc. 818, thus:

"Accord and satisfaction with one of several plaintiffs or joint creditors is a complete extinction of the claim and is a good accord and satisfaction without showing that the one who made the settlement had authority from the others to do so."

The settlement made by Hochstetler with plaintiff worked an accord and satisfaction and discharged the claim in suit. The trial judge should have proceeded no further after such condition was disclosed. The judgment of the Municipal Court is reversed and a judgment of nil cadit and for costs entered in this court.

REVEREND AND HONORABLE MR. JUSTICE
AND FOR COSTS.

203 I.A. 219

JAMES DONGYAN,
Appellee,

vs.

NATIONAL LIFE INSURANCE COMPANY
OF THE UNITED STATES OF AMERICA,
WERNER BROS. EXPRESS & STORAGE
CO., ALBERT M. JOHNSON, LEWIS A.
STEBBINS, HENRY H. WINDSOR and
OLIVER L. WATSON,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. We assume after an examination of the record that appellee, realizing the futility of an attempt to sustain the action of the trial court, refrained from any effort to fend off the inevitable. The order appealed from was entered at a time when the court lacked jurisdiction so to do, and it is clearly void.

At the November term 1915 the court dismissed the suit for the failure of plaintiff to file a bond for costs. At the January term 1916 on motion of plaintiff the court vacated the order of dismissal on the ground that the order of dismissal was entered because the clerk had placed the motion upon the contested motion calendar while there was no motion in writing as required by the rules of the court, and that the court supposing such motion was on file entered the order of dismissal. The court found that its action in dismissing the suit in the absence of a written motion was an error of fact. The motion to dismiss was heard and entered in the absence of plaintiff, although his counsel had caused the motion to be placed upon the contested motion calendar.

Because the court did not know when the order

2031.A.219

ALFRED W. ROBERTS

CHIEF OF POLICE

ALFRED W. ROBERTS
CHIEF OF POLICE

78

NATIONAL LIFE INSURANCE COMPANY
OF THE UNITED STATES OF AMERICA
TRUSTEES: JAMES H. HARRIS & JOHN W.
CO., ALBERT E. JOHNSON, LEWIS A.
ATTORNEYS: MORLEY H. BROWN and
WILLIAM L. AYERSON
Appellants.

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

This is an undoubted appeal. It seems to me

an examination of the record that would, revealing the

utility of an attempt to sustain the action of the trial

court, and should have been left to the jury.

The order appealed from was entered at a time when the court

lacked jurisdiction to do so, and it is clearly void.

As the November term 1915 the court dismissed

the suit for the failure of plaintiff to file a bond for

costs. At the January term 1916 on motion of plaintiff the

court vacated the order of dismissal on the ground that the

order of dismissal was entered because the clerk had placed

the motion upon the contested motion calendar while there was

no action in writing as required by the rules of the court,

and that the court suspending such motion was not the proper

the order of dismissal. The court found that the action in

dismissing the suit in the absence of a written motion was

an error of fact. The action to dismiss was heard and entered

in the absence of plaintiff, although his counsel had appeared

the motion to be placed upon the contested motion calendar.

Because the court did not know when the order

was entered that the motion made to dismiss was not in writing, and notwithstanding that if the court had possessed such knowledge the order would not have been entered, this in no view of the case rendered the error in so doing, if error it was, one of fact and not of law. The most that can be said of the omission to file a written motion is, that it was an error of procedure and can in no aspect of the case be regarded as an error of fact. Section 89 of the Practice Act had, in these circumstances, no application. The order vacating the judgment after the term at which it was entered is void. Barnes v. Chicago City Ry. Co., 185 Ill. App. 148; Pisa v. Rezek, 286 Ill. 344. What Mr. Justice Adams said in the Pisa case supra in 108 Ill. App. 198, is not only applicable here but determinative of the whole jurisdictional question involved. He said in substance: Conceding that court rules not in conflict with any statute have, with reference to practice in the court, all the binding effect of a statute, the real question is whether non-compliance with these rules of practice affects the jurisdiction of the court, and even assuming that motions placed on the contested motion calendar could not regularly be called up for disposition except on notice, yet if the motion is called up and disposed of without such notice having been given, this is a mere irregularity, or error, and does not affect the jurisdiction. The rules are merely regulative of the practice. While in some of the cases cited by counsel it has been held error for the court to disregard its rules of practice, no case has been cited, nor has it been held in any case known to us that such disregard affects the question of jurisdiction. The court having had jurisdiction of the persons and the subject matter when the order was made dismissing the appeal, and a number

was entered that the motion made to dismiss was not in writing, and notwithstanding that if the court had possessed such knowledge the order would not have been entered. This in no view of the case rendered the error in no way, if error it was, one of fact and not of law. The point that can be said of the omission to file a written motion is, that it was an error of procedure and can in no respect of the case be regarded as an error of fact. Section 39 of the Practice Act had, in these circumstances, no application. The order vacating the judgment after the term at which it was entered is void. Barney v. Chicago City Ry. Co., 108 Ill. App. 145; Wiss v. Foxen, 268 Ill. 344. That v. Justice seems said in the Wiss case supra in 108 Ill. App. 148, is not only applicable here but determinative of the whole jurisdictional question involved. He said in substance: "Conceding that court rules not in conflict with any statute have, with reference to practice in the court, all the binding effect of a statute, the real question is whether non-compliance with these rules of practice vitiate the jurisdiction of the court, and even assuming that actions filed on the extended calendar could not regularly be called up for disposition as set on motion, yet if the motion is called up and disposition of without such notice having been given, this is a case irregularly, or error, and does not affect the jurisdiction. The rules are merely regulative of the practice. While in some of the cases cited by counsel it has been held error for the court to disregard the rules of practice, no case has been cited, nor has it been held in any case known to me that such irregularity affects the question of jurisdiction. The court having had jurisdiction of the persons and the subject matter when the order was made dismissing the appeal, and a number

of terms of the court having intervened between the term when the order was entered and the date when the motion to vacate the order was made, the court was powerless to allow the motion. The judgment dismissing the appeal is final and binding on the parties, and the law is thoroughly settled in this state by a long line of decisions that a court cannot set aside or vacate such a judgment at a term subsequent to that at which it was rendered.

The judgment of the Superior Court setting aside the order of dismissal is reversed.

REVERSED.

of terms of the court having intervened between the time when the order was entered and the date when the order was vacated the order was made, the court was prepared to allow the motion. The judgment dismissing the appeal is hereby affirmed on the merits, and the law is accordingly settled in this state by a long line of decisions that a court cannot set aside or vacate even a judgment at a term subsequent to that at which it was rendered. The judgment of the District Court setting aside the order of dismissal is reversed.

REVEREND.

203 I.A. 220

ARTHUR C. MARSHALL,
Plaintiff in Error,

vs.

DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY, a corporation,
Defendant in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

The judgment in the trial court was for \$99.20 upon a trial without a jury, and plaintiff seeks this review and a judgment for the full amount of his claim.

The stenographic report was on motion stricken from the record and we are therefore confined in our duty to search for error to the statutory record. The main question for our consideration in the present condition of the record is: Does the affidavit of defense state facts which if proven constitute a bar to the action? We think it does, and on that assumption the judgment should be affirmed.

The statement of claim avers a shipment by plaintiff of 310 boxes of oranges in good condition from Oviedo, Florida, to Norwich, New York, which were received by defendant at Northumberland, Pennsylvania, for carriage to destination; that the shipment reached its destination in bad condition through the negligence of defendant; and that the oranges were sold and defendant damaged \$500.

In its affidavit of meritorious defense defendant denied that the oranges were delivered to the initial carrier in sound condition, and denied that they were damaged while in its possession by any act on its part, or that any damage resulted to the oranges while in its

203 I.A. 220

WITNESS TO SUBMIT
COURT OF CHICAGO.

ALFRED O. MARSHALL,
Plaintiff in Error,

vs.

DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY, a corporation,
Defendant in Error.

MR. JUSTICE HORDON DELIVERED THE OPINION OF THE COURT.

The judgment in the trial court was for \$22.20 upon a trial without a jury, and plaintiff seeks this review and a judgment for the full amount of his claim.

The stenographic report was on motion withdrawn from the record and we are therefore confined in our duty to search for error to the statutory record. The main question for our consideration in the present condition of the record is: Does the affidavit of defense state facts which if proven constitute a bar to the action? We think it does, and on that assumption the judgment should be affirmed.

The statement of claim avers a shipment by plaintiff of 210 boxes of oranges in good condition from Oviedo, Florida, to Norwich, New York, which were received by defendant at Northumberland, Pennsylvania, for carriage to destination; that the shipment reached its destination in bad condition through the negligence of defendant; and that the oranges were sold and defendant damaged.

In its affidavit of meritorious defense defendant denied that the oranges were delivered to the initial carrier in sound condition, and denied that they were damaged while in its possession by any act on its part, or that any damage resulted to the oranges while in its

possession, and averred that the oranges were sold by defendant in their damaged condition after notice to plaintiff and at its request; that the net amount realized from the sale, being the amount of the judgment, was tendered to plaintiff and refused; that defendant acted in good faith and that no notice in writing of plaintiff's claim was made within four months, as required by the terms of the contract of carriage. These defenses being proven, as we assume they were, the extent of the right of recovery was limited to the amount of the net proceeds of the sale of the oranges, tendered to plaintiff before action, for which plaintiff had judgment. Hagen Paper Co. v. East St. Louis Publishing Co., 269 Ill. 535.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

possession, and averred that the oranges were sold by defendant in their damaged condition after notice to plaintiff and at its request; that the net amount realized from the sale, being the amount of the judgment, was tendered to plaintiff and refused; that defendant acted in good faith and that no notice in writing of plaintiff's claim was made within four months, as required by the terms of the contract of carriage. These defenses being proven, as we assume they were, the extent of the right of recovery was limited to the amount of the net proceeds of the sale of the oranges, tendered to plaintiff before action, for which plaintiff had judgment. Hazen Paper Co. v. Lee & Lewis Publishing Co., 259 Ill. 535.

The judgment of the Municipal Court is affirmed.

ATTEST.

LOUIS ROSENBLUTH, doing business
as the Anchor Mills,

Appellant,

vs.

HEINTZ FOOD COMPANY OF ILLINOIS,
a corporation,

Appellee.

203 I.A. 226

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant had judgment, on a trial before the court without a jury, on its claim of set-off for \$66.44, and plaintiff prosecutes this appeal, asking a reversal and a judgment upon his claim for \$38.06.

Plaintiff sued to recover \$38.06 for flour sold and delivered at various times to defendant. Defendant interposed a set-off, claiming \$160 as damages suffered by it by reason of the fact that plaintiff failed to deliver winter wheat flour, but in its stead delivered corn flour, causing a loss of two batches of biscuits in the making of which the corn flour was used.

We think the court might properly find that defendant by its evidence sustained its cross claim as alleged even after eliminating the testimony of the witness Heintz, which was objected to as hearsay. We think the testimony sustains defendant's contention that the two batches of biscuits were spoiled because plaintiff delivered corn flour instead of winter wheat flour as ordered, and that the mistake was not readily discoverable until the biscuits were baked, when the color would betray the fact that corn flour and not winter wheat flour was the ingredient that had been used.

The biscuits in question, manufactured by defend-

2081.A.228

LOUIS ROSENTHAL
COURT OF CHICAGO

LOUIS ROSENTHAL, doing business
as the Auctioneers,
Appellants,
vs.
HEINZ FOOD COMPANY OF ILLINOIS,
a corporation,
Appellees.

THE JUDGE HEREIN RENDERED THE VERDICT ON THE 10TH.

Defendant had judgment, on a trial before the
court without a jury, on the claim of set-off for \$58.44,
and plaintiff prosecutes this appeal, claiming a reversal and
a judgment upon his claim for \$38.00.

Plaintiff sued to recover \$38.00 for flour sold
and delivered at various times to defendant. Defendant inter-
posed a set-off, claiming \$100 as damages suffered by it by
reason of the fact that plaintiff failed to deliver winter
wheat flour, but in its stead delivered corn flour, causing a
loss of two batches of biscuits in the making of which the
corn flour was used.

We think the court might properly find that de-
fendant by its evidence sustained its cross claim as alleged,
even after eliminating the testimony of the witness Heinz,
which was objected to as hearsay. We think the testimony
sustains defendant's contention that the two batches of
biscuits were spoiled because plaintiff delivered corn flour
instead of winter wheat flour as ordered, and that the mistake
was not readily discoverable until the biscuits were baked,
when the error would betray the fact that corn flour and not
winter wheat flour was the ingredient that had been used.
The biscuits in question, manufactured by defend-

ant, were what are known as "laxative biscuits." The ingredients which gave the biscuits their peculiar laxative characteristic were a secret formula not disclosed by the testimony. It is contended that the spoiled condition of the biscuits may have been brought about by other ingredients known only to and used by defendant with the flour in making the biscuits. We think, however, the whole evidence considered, that the court might properly reach the conclusion that the spoiled condition of the biscuits resulted from plaintiff delivering corn flour instead of the winter wheat flour ordered.

The trial Judge saw the witnesses and was better able than are we to judge of the weight to be given to their testimony and to give credit accordingly. Notwithstanding the evidence is somewhat in conflict, yet as we are unable to say that the finding of the court is contrary to its probative force, we are not permitted to disturb the finding of the trial Judge, whose opportunities for determining the weight and preponderance of the evidence were so much better than ours. He had the parties before him, while we have only the unresponsive record.

We see no occasion to disagree with the conclusions which the trial Judge reached, and the judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

... that the known as "Inclusive" ...
... which have the ...
... were a ...
... it is ...
... may have been ...
... to be used by ...
... which, however, the ...
... that the ...
... which ...
... delivering ...
... offered.

The trial judge ...
... who ...
... testimony ...
... the evidence is ...
... say that the ...
... force, we are not ...
... trial judge, those ...
... and ...
... that, he had ...
... cannot ...

We see no occasion ...
... which the trial judge ...
... National Court is ...

ALLIANCE.

W. B. FULLER for use of
NELL E. JORDAN,
Appellee,

vs.

THE BRIDGEPORT WOOD FINISHING
COMPANY, a corporation, etc.,
Appellant.

203 I.A. 227

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment for \$560 against appellant as garnishee on a trial before the court without a jury, and ordering that \$167.10 thereof be recovered for the use of the beneficial plaintiff.

The answer of the garnishee sets up that W. B. Fuller was in the employ of defendant at Bridgeport, Connecticut, and that at the time of the service of the writ it was indebted to him in the sum of \$17.50; that Fuller was a married man, residing with his family in the State of Connecticut. Exemptions were claimed for Fuller by the garnishee on the ground that his wages under the laws of Connecticut were exempt from garnishment, all wages earned for personal services being exempt under the laws of that State. The answer further sets up that Fuller was a laborer working around the factory of appellant and that his wages were paid on Saturday of each week.

The first answer was on motion stricken and appellant ordered to file a new answer setting up "how much money had been paid by the garnishee to W. B. Fuller since the service of the garnishment writ." Interrogatories

2007-1-227

APPEAL FROM DECISION
COURT OF APPEALS

U. S. DISTRICT COURT FOR DISTRICT OF
MASSACHUSETTS
APPEAL

THE MASSACHUSETTS WOOD PAPER
CORPORATION, a corporation,
Appellant.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

This is an appeal from a judgment of the
for \$100 against appellant as damages on a trial before
the court without a jury, and ordering that \$100 be
of be recovered for the use of the beneficial plaintiff.

The answer of the defendant sets up that
... was in the employ of defendant at Bridgport, Mass.
... and that at the time of the service of the writ
it was indebted to him in the sum of \$100.00; that ...
was a married man, residing with his family in ...
of Connecticut. ... were claimed for ...
the ... on the ground that the ... under the law
of Connecticut were ... from ...
earned for ... services being ...
of that state. The answer further ...
was a ... working ... the ...
that his wages were paid on Saturday of each week.

The first answer sets up motion ...
... ordered to file a new answer ...
money had been paid by the ... to ...
the service of the plaintiff with."

were propounded to the garnishee and the answers thereto substantiated the facts set up in the answer. The facts set forth in appellant's answer were not controverted by any pleading or affidavit or in any way denied or put in issue; appellant as garnishee was therefore entitled to be discharged. No issue having been joined upon its answer, the averments of fact therein stood admitted and must be taken as true. Wabash R. R. Co. v. Dougan, 142 Ill. 248.

The money in the hands of the garnishee due to Fuller being for wages as a laborer were, under the averments of the answer, exempt. The assertion of the right of exemption in the answer by appellant was sufficient to preserve that right to Fuller. R. Jackson & Co. v. Republic Iron and Steel Co., 141 Ill. App. 453.

Under Section 14 of the Garnishment Act as amended in 1901, the employer is not required to answer for wages earned by a wage earner after the service of the writ. Lund for use, etc. v. Dole Valve Co., 185 Ill. App. 350.

A 5948
The trial court in requiring appellant as garnishee to answer for wages earned by Fuller after the service of the writ of garnishment, did so in direct contravention of the provision of Section 14 of the Garnishment Act, supra.

The judgment of the Municipal Court is reversed and the cause is remanded with directions to the Municipal Court to enter an order discharging appellant as garnishee.

REVERSED AND REMANDED
WITH DIRECTIONS.

were propounded to the garnishee and the answers thereto substantiated the facts set up in the answer. The facts set forth in appellant's answer were not controverted by any pleading or affidavit or in any way denied or put in issue; appellant as garnishee was therefore entitled to be discharged. No issue having been joined upon its answer, the averments of fact therein stood admitted and must be taken as true. Walsah R. R. Co. v. Brown, 142 Ill. 243. The money in the hands of the garnishee due to Miller being for wages as a laborer were, under the averments of the answer, exact. The assertion of the right of exemption in the answer by appellant was sufficient to preserve that right to Miller. R. Jackson & Co. v. Republic Iron and Steel Co., 141 Ill. App. 453.

Under Section 14 of the Garnishment Act as amended in 1901, the employer is not required to answer for wages earned by a wage earner after the service of the writ. Land for Use, etc. v. Dole Valve Co., 185 Ill. App. 380. The trial court in requiring appellant as garnishee to answer for wages earned by Miller after the service of the writ of garnishment, did so in direct contravention of the provision of Section 14 of the Garnishment Act, supra.

The judgment of the Municipal Court is reversed and the cause is remanded with directions to the Municipal Court to enter an order discharging appellant as garnishee.

REVEREND AND HONORABLE

JUDGES.

2426

I. M. WEINGARDEN,
Plaintiff in Error.

vs.

LOUIS WEINBERG and
ISADORE WEINBERG,
Defendants in Error.

203 I.A. 228

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

There is a document found in the record in this case certified by the trial Judge as a "certificate of evidence." It cannot even by the most liberal construction be held to constitute a stenographic report of the proceedings had upon the trial of the cause, or as fulfilling the requirements of a bill of exceptions. Nowhere in this so-called "certificate of evidence" or in the certificate of the trial Judge thereto is it stated that the certificate contains all of the evidence in the case. The certificates and oaths of the court reporter and of the trial attorney for plaintiff in error, which follow that of the trial Judge, form no part of such certificate of evidence. This is a case of the first class in the Municipal Court. In this class of cases the proceedings, other than the statutory record, must be preserved for review by bill of exceptions, stenographic report or certificate of evidence. There is no bill of exceptions, stenographic report or certificate of evidence in this record, either in fact or by construction of the document called a "certificate of evidence." The making of a certificate that the record contains all the evidence is a judicial act which must be performed by the trial Judge. Certificates of a reporter and an attorney for one of the parties cannot be received as a substitute.

2031.A.228

EXHIBIT TO EXHIBIT 2031.A.228
OF EVIDENCE

I. A. WEINGARTEN,
Defendant in Error,
vs.
LOUIS WEINGARTEN and
ISABELE WEINGARTEN,
Defendants in Error.

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

There is a document found in the books in this case certified by the trial judge as a certificate of evidence. It cannot even by the most liberal construction be held to constitute a stenographic report of the proceedings had upon the trial of the cause, or as fulfilling the requirements of a bill of exceptions. Reports in this case called "certificate of evidence" or in the certificate of the trial judge thereto is it stated that the certificate contains all of the evidence in the case. The certificate and notes of the court reporter and of the trial judge for plaintiff in error, which follow that of the trial judge, form part of the certificate of evidence. This is a case of the first class in the highest court. In this class of cases the proceedings, other than the testimony, must be preserved for review by bill of exceptions. Stenographic report or certificate of evidence. There is no bill of exceptions, stenographic report or certificate of evidence in this record, either in fact or by construction. The document called a "certificate of evidence" is the making of a certificate that the record contained in the evidence is a judicial act which may be returned to the trial judge. Certificate of a reporter and an attorney for one of the parties cannot be received as a certificate.

Interpolating the affidavits referred to is tantamount to conceding that the facts therein recited are necessary to be made to appear to present such facts for review in this court. The method pursued, however, is abortive for such purpose.

8618

Section 81 of the Practice Act provides for three methods of preserving the facts in a cause for review. They are by bill of exceptions, stenographic report and certificate of evidence. This section governs in first class cases in the Municipal Court. In that section there is a provision for a praecipe record, but the record before us does not purport to be of that character; consequently, the reasoning in Miller v. Anderson, 269 Ill. 608, has no application.

Without a bill of exceptions, certificate of evidence or stenographic report, certifying that it contains all the evidence heard upon the trial in a first class case in the Municipal Court, unless such record is a praecipe record, a court of review will presume that the judgment is sustained by the evidence heard upon the trial, and such judgment will not be disturbed upon review for errors of fact. People v. Moore, 188 Ill. App. 418.

The errors assigned call for a review of the evidence, none of which involves the statutory record solvable without reference to a bill of exceptions.

Defendants in error move to strike the document called a "certificate of evidence" from the record and to affirm the judgment. The motion is allowed and the judgment of the Municipal Court is affirmed.

AFFIRMED.

Interpreting the affidavit returned to it
 tantamount to concluding that the facts therein recited are
 necessary to be made to appear as grounds upon which for
 review in this court. The second question, however, is
 objective for each purpose.

Section 83 of the Evidence Act provides for
 three methods of preserving the facts in a record for review.
 They are by bill of exceptions, stipulations, and by
 affidavits of evidence. This section governs in first class
 cases in the Municipal Court. In such cases there is a
 provision for a practice record, but the record before us
 does not purport to be of that character; consequently,
 the question in Miller v. Anderson, 222 Ill. 621, has no
 application.

Without a bill of exceptions, certification of
 evidence or stipulations report, certifying that it contains
 all the evidence heard upon the trial in a first class case
 in the Municipal Court, unless such report is a practice
 record, a court of review will presume that the judgment is
 sustained by the evidence heard upon the trial, and such
 judgment will not be disturbed upon review for errors of
 fact. People v. Brown, 122 Ill. 421, 422.

The error assigned (and) for a review of the
 evidence, none of which involves the materiality thereof
 certifies without reference to a bill of exceptions.
 Manifestly in error was to strike the judgment
 called a certification of evidence, from the record and so
 affirm the judgment. The motion is allowed and the judgment
 of the Municipal Court is affirmed.

D. I. BUSHNELL and R. W. POMMER,
Partners as D. I. BUSHNELL & CO.,
Plaintiffs in Error,

vs.

HENRY H. CHESTER, doing business
as H. H. CHESTER & CO.,
Defendant in Error.

203 T.A. 229

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion
of the court.

D. I. Bushnell and R. W. Pommer, partners as D. I. Bushnell & Co., brought suit against Henry H. Chester, doing business as H. H. Chester & Co., to recover the sum of \$566.50, damages alleged to have been sustained by reason of the defendant's failure to carry out a written contract entered into between the parties. The case was tried before the court without a jury, and from a judgment for costs entered in favor of the defendant, the plaintiffs prosecute this writ of error.

[It appears that on July 29, 1913, the parties entered into a written contract whereby the plaintiffs agreed to purchase and the defendant agreed to sell 1000 bushels of onion ^{of specified varieties} sets to be delivered on or about February 10, 1914. The contract provided among other things that the onion sets were "to be screened through one inch mesh sieve." The defendant, whose place of business was in Chicago, shipped the onion sets to the plaintiffs at St. Louis. When the shipment reached St. Louis plaintiffs made an examination of the sets and refused to accept them on the ground that many of them were too large and some of them rotten. After considerable correspondence between the parties, the defendant ordered the car returned to him at Chicago, which was done. Plaintiffs demanded

2007 A. 229

D. I. BUSHNELL and H. W. FOWLER,
Partners in D. I. BUSHNELL & CO.,
Plaintiffs in Error,

VERSUS

THE

JUDICIAL COURT

OF ALABAMA.

WILLIAM B. BUSHNELL, being
as H. W. FOWLER & CO.,
Defendants in Error.

MR. JUSTICE J. C. GIBSON delivered the opinion

of the court.

D. I. Bushnell and H. W. Fowler, partners as D. I. Bushnell & Co., brought suit against Henry H. Wheeler, doing business as H. H. Wheeler & Co., to recover the sum of \$200.00, damages alleged to have been sustained by reason of the defendant's failure to carry out a written contract entered into between the parties. The case was tried before the court without a jury, and from a judgment for costs entered in favor of the defendant, the plaintiff presents this writ of error.

It appears that on July 29, 1913, the parties entered into a written contract whereby the plaintiff agreed to purchase and the defendant agreed to sell 1000 pounds of cotton seeds to be delivered on or about February 10, 1914. The contract provided that either party might terminate the contract "if he so desired through any such cause." The defendant, where place of business was in Mobile, shipped the cotton seeds to the plaintiff at St. Louis. When the plaintiff received the seeds, the plaintiff made an examination of the seeds and found them to be short on the ground that they were too large and some of them rotten. After a careful comparison between the parties, the defendant refused the return of the seeds to him at Mobile, which was done. Plaintiff demanded

ad X that the defendant ship the onion sets called for by the contract, and advised the defendant that unless this was done, plaintiffs would go upon the market and purchase such sets at the market price and hold the defendant for the loss. The defendant contended that the sets were in accordance with the contract and refused to ship any more. After the sets were returned to the defendant plaintiffs purchased from other parties other sets of the kind mentioned in the contract, paying therefor \$566.50 more than they had agreed to pay the defendant, for which amount this suit was brought. It was stipulated between the parties that if the plaintiffs were entitled to recover, the judgment should be for the amount of their claim.

L The evidence shows that some of the onion sets were an inch and an eighth to an inch and a quarter in diameter and too large to pass through a one inch mesh sieve; plaintiffs' evidence tending to prove a larger number than that introduced on behalf of the defendant. It also appears from the evidence that the sets were screened through a seven-eighths inch bar sieve with cross-bars five inches apart and not through a one inch mesh sieve, before shipment.

apl Plaintiffs' position seems to be that the contract was not complied with, because (1) the sets were not actually screened through one inch mesh sieve, and (2) some of the sets were too large to pass through a one inch mesh sieve.

The court found as a fact that certain tests were made by both the plaintiffs and the defendant to ascertain the size of the sets and "that some of the onions of said shipment of 1000 bushels * * * were too large to go through a one inch mesh sieve." The evidence introduced on behalf of the plaintiffs was in the form of depositions. Witnesses testified in open court on behalf of the defendant. The record, however, does not give any of the questions and

that the defendant ship the onion sets called for by the contract, and advised the plaintiff that unless this was done, plaintiff would lose the market and produce ship sets at the market price and hold the defendant for the loss. The defendant contacted that the sets were in compliance with the contract and refused to ship any more. After the sets were returned to the defendant plaintiff purchased from other parties other sets of the same weight in the contract, paying \$300.00 more than they had agreed to pay the defendant, for which amount this suit was brought. It was stipulated between the parties that if the plaintiff was entitled to recover, the defendant should be for the amount of their claim.

The evidence shows that some of the onion sets were an inch and an eighth to an inch and a quarter in diameter and too large to pass through a one inch mesh sieve; plaintiff's evidence tending to prove a larger number than that introduced on behalf of the defendant. It also appears from the evidence that the sets were screened through a seven-eighths inch bar sieve with cross-bars five inches apart, and not through a one inch mesh sieve, before shipment.

Plaintiff's position seems to be that the contract was not complied with, because (1) the sets were not actually screened through one inch mesh sieve, and (2) some of the sets were too large to pass through a one inch mesh sieve.

The court found as a fact that certain tests were made by both the plaintiff and the defendant to ascertain the size of the sets and "that some of the onion sets introduced of 1 1/2 pounds * * * were too large to be through a one inch mesh sieve." The evidence introduced on behalf of the plaintiff was in the form of depositions. Witness testified in open court on behalf of the defendant. The record, however, does not give any of the questions and

answers put to any of the witnesses, but it is set forth only in narrative form. The number or quantity of the sets that were too large to pass through a one inch mesh sieve cannot be ascertained from the record, nor does the court make any specific finding in this regard.

We cannot agree with plaintiffs' contention that they are entitled to recover on the ground that the evidence shows that the sets were not actually screened through a one inch mesh sieve. This requirement of the contract was merely for the purpose of fixing the size of the sets, and it is not material whether they were actually screened, if the sets were of the size called for by the contract.

Plaintiffs next contend that they are entitled to recover for the reason that some of the onions were too large to pass through a one inch mesh sieve, and were not therefore of the size contemplated by the contract. The sale in this case was by a particular description as to kind and quality -- in other words, it was an agreement by the defendant to sell certain varieties of onion sets not more than one inch in diameter. A slight or partial neglect on the part of one of the parties to a contract to observe some of the terms or conditions thereof will not justify the other party to at once abandon the agreement. Pittenger v. Pittenger, 208 Ill. 582. Plaintiffs had no right to rescind the contract, unless the defendant had failed in a substantial manner to observe his part of the contract. There is no complaint that the kind of sets mentioned in the contract - red and yellow - were not tendered, the only objection being that some of them were more than one inch in diameter. The evidence tends to show that large sets are more apt to grow to seed than small ones, and are therefore

universe but to any of the witnesses, but it is not with
only in narrative form. The number or quantity of the
seeds that were too large to pass through a one inch mesh
sieve cannot be ascertained from the record, nor does the
court make any specific finding in this regard.

We cannot agree with Plaintiff's contention that
they are entitled to recover on the ground that the evidence
shows that the seeds were not actually screened through a one
inch mesh sieve. This requirement of the contract was merely
for the purpose of fixing the size of the seeds, and it is not
material whether they were actually screened, is the main
part of the sieve called for by the contract.

Plaintiff's next contention that they are entitled
to recover for the reason that some of the seeds were too
large to pass through a one inch mesh sieve, and were not
therefore of the size contemplated by the contract. The
only in this case was by a particular description as to
kind and quality -- in other words, it was an agreement by
the defendant to sell certain varieties of onion seeds not
more than one inch in diameter. A slight or partial neglect
on the part of one of the parties is a breach of contract
only if the terms of the contract demand it. Here,
the other party to the contract was the defendant. Plaintiff
v. Defendant, 100 Ill. 2d. Plaintiff had no right to
rescind the contract, unless the defendant had failed to
a substantial degree to observe the terms of the contract.
There is no complaint that the kind of seeds contracted for
the contract - red and yellow - were not delivered, the only
objection being that some of them were more than one inch
in diameter. The evidence tends to show that large seeds are
more apt to grow to seed than small ones, and are therefore

of less value. The court, however, evidently found that the sets tendered were in substantial conformity with the contract, and after a careful examination of the record, we are unable to say that such finding is not sustained by the evidence.

The case of Wabash Canning Company v. Nicholas, 187 Ill. App. 176, upon which plaintiffs rely is not in point. In that case there was a sale of "fancy Alaska peas*** like samples submitted." It was held that the contract was not satisfied by tendering Alaska peas like the samples, but that in addition, the peas tendered must be of the kind specified "fancy Alaska peas". In that case the kind of peas specified in the contract were not tendered, while in the case at bar, the kind of sets, viz., red and yellow, were tendered, and the only objection to them was that some of them were too large.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

the evidence, we are unable to say that such findings was contained by context, and after a careful reading of the transcript, the new material was in substantial conformity with the of less value. The court, however, evidently found that

187 III. App. 178, when the defendant was in the
 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000 1001 1002 1003 1004 1005 1006 1007 1008 1009 1010 1011 1012 1013 1014 1015 1016 1017 1018 1019 1020 1021 1022 1023 1024 1025 1026 1027 1028 1029 1030 1031 1032 1033 1034 1035 1036 1037 1038 1039 1040 1041 1042 1043 1044 1045 1046 1047 1048 1049 1050 1051 1052 1053 1054 1055 1056 1057 1058 1059 1060 1061 1062 1063 1064 1065 1066 1067 1068 1069 1070 1071 1072 1073 1074 1075 1076 1077 1078 1079 1080 1081 1082 1083 1084 1085 1086 1087 1088 1089 1090 1091 1092 1093 1094 1095 1096 1097 1098 1099 1100 1101 1102 1103 1104 1105 1106 1107 1108 1109 1110 1111 1112 1113 1114 1115 1116 1117 1118 1119 1120 1121 1122 1123 1124 1125 1126 1127 1128 1129 1130 1131 1132 1133 1134 1135 1136 1137 1138 1139 1140 1141 1142 1143 1144 1145 1146 1147 1148 1149 1150 1151 1152 1153 1154 1155 1156 1157 1158 1159 1160 1161 1162 1163 116

...and it is not to be taken as a statement of the opinion of the Government.

ELIOT

BARNEY NELSON and AXEL LeMOON,
Copartners, doing business as
NELSON & LE MOON,

Defendants in Error,

vs.

A. F. McKEOWN,

Plaintiff in Error.

203 I.A. 231

ERROR TO

MUNICIPAL COURT

OF CHICAGO,

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

Defendants in error brought suit against the
plaintiff in error in the Municipal Court of Chicago, to
recover for repairs and storage of defendant's automobile;
and supplies furnished. Plaintiffs recovered a judgment
for \$134.63, to reverse which the defendant prosecutes
this writ of error.

Plaintiffs' business was that of repairing
automobiles. The evidence tends to show that about January,
1910, the defendant together with one Pope took the auto-
mobile to plaintiffs' place of business, and on two differ-
ent occasions the defendant ordered certain repairs which
were made by the plaintiffs and paid for by the defendant;
that Pope was engaged in experimenting with a patented
spring hub, and the defendant loaned Pope the automobile
for such purpose. It was necessary during the experimenta-
tions that certain repairs be made and supplies furnished
for the automobile. The machine was taken out from time
to time by Pope and returned to plaintiffs' place of busi-
ness. On June 23, 1910, defendant called on plaintiffs and
obtained the machine and started to drive to his farm in

2081.A.281

RAYMOND HARRIS and ARTHUR LONDON,
 Defendants,
 vs.
 JAMES H. MOORE,
 Plaintiff.

Defendants in Error,

Plaintiff in Error.

vs.

A. F. MORROW,

Plaintiff in Error.

MUNICIPAL COURT
 OF CHICAGO,

MR. PRESIDING JUDGE: The court delivered the

opinion of the court.

The court in error brought suit against the

plaintiff in error in the Municipal Court of Chicago, to
 recover for repairs and damage to defendant's automobile;
 and supplies furnished. Plaintiff recovered a judgment
 for \$124.68, to reverse which the defendant presented
 this writ of error.

Plaintiff's business was that of repairing

automobiles. The evidence tends to show that about January,
 1910, the defendant together with one Pope took the auto-
 mobile to plaintiff's place of business, and on two differ-
 ent occasions the defendant ordered certain repairs which
 were made by the plaintiff and paid for by the defendant;
 that Pope was engaged in experimenting with a patented
 spring hub, and the defendant loaned Pope the automobile
 for such purpose. It was necessary during the experimen-
 tions that certain repairs be made and supplies furnished
 for the automobile. The machine was taken out from time
 to time by Pope and returned to plaintiff's place of busi-
 ness. On June 23, 1910, defendant called on plaintiff and
 obtained the machine and started to drive to his farm in

Lake County, when the machine broke down. He then had it returned to the plaintiffs and ordered certain repairs. The machine remained at plaintiffs' place of business until some time in the fall of 1910, when the defendant demanded his machine. Plaintiffs refused to deliver it to him until he had paid for the work which they had done at his request, and also the work done on the machine and supplies furnished during the time Pope was using it. They also claimed a bill for storage. The defendant was willing to pay the cost of the repairs which he had ordered amounting to \$19.50, but refused to pay any of the other demands. Plaintiffs brought this suit March 2, 1914, and claimed, in addition to the items above mentioned, a charge of \$5 per month for storing the car until the time of the commencement of the suit. The case was tried before the court without a jury. The court held that the defendant was liable for the repairs made and supplies furnished during the time Pope had the machine, and for storage on the car until the date when the defendant demanded the same in the fall of 1910, but disallowed the claim for storage after that date.

ch
+ sum.
<
The defendant contends that he was not liable for the repairs and materials furnished during the time Pope had the car. It would serve no useful purpose to discuss the evidence in this regard. Suffice it to say that it was conflicting. The court saw and heard the witnesses and was in a much better position to determine the facts than we are, and after a careful consideration of all the evidence, we cannot say that his finding is manifestly against the weight of the evidence. It will therefore not be disturbed.

that day, when the machine broke down. He then had it
returned to the machine shop and overhauled and repaired.
The machine remained at plaintiff's place of business until
some time in the fall of 1910, when the defendant demanded
his machine. Plaintiff refused to deliver it to the defendant
he had paid for the work which they had done at his request,
and also the work done on the machine and supplies furnished
during the time she was using it. They also claimed a
bill for storage. The defendant was willing to pay the
cost of the repairs which he had ordered amounted to \$10.00,
but refused to pay any of the other amounts. Plaintiff
brought this suit March 2, 1914, and claimed, in addition
to the items above mentioned, a charge of \$2 per month for
storing the car until the time of the commencement of the
suit. The case was tried before the court without a jury.
The court held that the defendant was liable for the repairs
made and repairs furnished during the time the car was
used, and for storage on the car until the date when the
defendant demanded the same in the fall of 1910, but dis-
allowed the claim for storage after that date.

The defendant contends that he was not liable
for the repairs and storage furnished during the time
the car was used. It would serve no useful purpose to
discuss the evidence in this regard. Suffice it to say
that it was conflicting. The court saw and heard the wit-
nesses and was in a much better position to determine the
facts than we are, and after a careful consideration of all
the evidence, he cannot say that the finding is manifestly
against the weight of the evidence. It will therefore
not be disturbed.

cd | The defendant further contends that he was not
liable for the storage allowed, \$42.50. It appears that
the car was in storage from May 10th to August 30th, 1910,
a period of eighty-five days, for which plaintiffs charged
fifty cents per day. Plaintiffs were entitled to a reason-
able charge for storing the car, and no complaint is made
that the amount is unreasonable. No storage was allowed
after the time defendant demanded his car in the fall
of 1910, and counsel for plaintiffs admit in this court
that the ruling of the trial court in this regard was
proper.

Finding no reversible error in the record, the
judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

The defendant further contends that he was not
liable for the damage alleged, \$25.00. It appears that
the car was in storage from May 1930 to August 1931, 1932,
a period of eighty-five days, for which plaintiff charged
twenty cents per day. Plaintiff's witness testified to a payment
of \$25.00 for storage the car, and on cross-examination it was
shown that the amount is immaterial. No damage was alleged
after the same payment because his car in the fall
of 1931, and because the plaintiff's car in this case
was the subject of the trial court in this regard was
proper.

Finding no reversible error in the verdict, the
judgment of the circuit court of appeals is affirmed.

ATTORNEYS.

250 - 21645.

THE CHICAGO BUILDERS' SPECIALTIES
CO., a corporation,

Defendant in Error,

vs.

THE KOEHRING MACHINE COMPANY, a
corporation,

Plaintiff in Error.

203 T.A. 232

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

The Chicago Builders' Specialties Company, a corporation, brought suit against The Koehring Machine Company, a corporation, to recover damages for breach of a contract between the parties. The case was tried before the court without a jury, and from a judgment entered in favor of the plaintiff for the amount of its claim, \$144, the defendant prosecutes this writ of error.

The defendant contends that the evidence does not establish that there was a contract between the parties, and that as the plaintiff's claim is based on the breach of a contract, the judgment is not supported by the evidence. ~~It appears from the evidence that~~ [The plaintiff on December 23, 1909, wrote the defendant concerning the purchase of certain machinery. To this ^{defendant} plaintiff replied giving the cost of the several items and stating that the defendant could fill the order immediately. Nothing further ^{so} appears to have been done until March 19, 1910, when the parties communicated by telephone. A witness for the plaintiff testified that on that date he talked over the telephone with a representative of the defendant and told him that they were ready to close the Horrabin deal, and asked the defendant how soon the order

2081A. 282

SEE ALSO BUREAU, BOSTON
60, A corporation,

Deceased in 1917,

1917

1917

ON 11/17/17

a

THE BOSTON TRADING COMPANY, a
corporation,

located in 1917.

RE. THE BOSTON TRADING COMPANY, INC.

of the court.

The Chicago Knifery, Specialists Company, a cor-

poration, brought suit against the Boston Machine Company,

a corporation, to recover damages for breach of a contract

between the parties. The case was tried before the court

without a jury, and from a judgment entered in favor of the

plaintiff for the amount of the claim, \$114, the defendant

proposed this writ of error.

The defendant contends that the evidence does not

establish that there was a contract between the parties.

and that as for plaintiff's claim is based on the breach of

a contract, the judgment is not supported by the evidence.

It appears from the evidence that the plaintiff on December 22,

1910, wrote the defendant concerning the purchase of certain

machinery. To this plaintiff replied stating the cost of the

several items and stating that the defendant should bill the

order immediately. Plaintiff's order appears to have been made

until March 12, 1910, when the parties communicated by

telegram. A witness for the plaintiff testified that on

that date he called over the telephone with a representative

of the defendant and told him that they were ready to close

the bargain deal, and caused the defendant to sign the order

2.

could be filled, ^{and} that the defendant replied by Wednesday of the following week. Immediately afterwards plaintiff wrote a letter confirming the telephone communication and instructed the defendant to ship the goods to plaintiff's customer, Horrabin, at Iowa City, Iowa. There were further communications between the parties in reference to the method of payment, the defendant insisting that it would not ship the goods except upon the receipt of a certified check for the amount, \$411. The plaintiff sent a certified check March 28th through a bank, and on March 31st, the defendant wrote a letter to the plaintiff as follows: "Owing to your late reply to our request for certified check with your order No. 5190, we cannot now except this order, and have requested the bank to return you check." It further appears ~~from the evidence~~ that the defendant filled the Horrabin order direct on March 25th. A witness for the defendant testified that in the telephone conversation March 19th, he told the plaintiff he would not accept the order; that the plaintiff would have to take it up direct with the defendant's Chicago agent. The evidence further shows ^{ed} that plaintiff had contracted to sell the machinery to Horrabin for \$555, and his profit, ^{ee} ~~therefore~~, would be \$144.]

< After a careful examination of all the testimony, we cannot say that the finding of the trial court that a contract was entered into between the parties is manifestly against the weight of the evidence.

cd | The defendant further contends that even if there was a contract, the default of the defendant in making prompt payment constituted a breach, and the defendant was therefore

could be killed, that the defendant replied by threatening to
the following week. Immediately afterwards the defendant wrote
a letter containing the reference communication and instructed
the defendant to only the books to plaintiff's attorney,
referred to as John W. Jones. There were further communica-
tions between the parties in reference to the books of the
case, the defendant insisting that it would not help the
books except upon the receipt of a certified check for the
amount, \$111. The plaintiff sent a certified check with this
through a bank, and on March 11th, the defendant wrote a
letter to the plaintiff as follows: "With a view to your late
to our request for certified check with your order of \$111,
we cannot now comply with order, and have returned the same
to return you amount." It further appears from the evidence
that the defendant killed the Horvath order direct on
March 28th. A witness for the defendant testified that in
the telephone conversation March 13th, he told the plaintiff
he would not accept the order, that the plaintiff would have
to come to the office with the defendant's money order.
The evidence further shows that plaintiff was not to be
with the defendant in March 1934, and his presence
therefore, would be 1934.
After a careful examination of all the testimony,
we cannot say that the finding of the jury was such a
mistake as to require the grant of a new trial.
The defendant further submitted that even if there
was a mistake, the remedy of the defendant is to bring a
petition for a writ of habeas corpus, and the defendant was therefore

3.

< | entitled to treat the contract as abandoned. We think the
evidence was sufficient to justify the court in finding
that the contract was not abandoned.

Finding no reversible error in the record, the
judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

entitled to treat the contract as abandoned. In view of
evidence was sufficient to justify the court in the fact
that the contract was not abandoned.

Finding no reversible error in the record, the
judgment of the Municipal Court of Chicago is affirmed.

REVEREND.

THE PETER SCHOENHOFEN BREW-
ING COMPANY (a corporation),

Defendant in Error,

vs.

MRS. H. M. NEWBOLD,

Plaintiff in Error.)

203 I.A. 234

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

The Peter Schoenhofen Brewing Company, a corpora-
tion, brought suit against Mrs. H. M. Newbold to recover
for goods sold and delivered, and obtained a judgment for
the amount of its claim \$558, to reverse which the defen-
dant prosecutes this writ of error.

Plaintiff alleged that it sold and delivered
to the defendant at her special instance and request
certain barrels of beer, at a price of \$8 per barrel;
that certain payments were made by the defendant, and
that there was still due and unpaid \$558.

The defendant filed an affidavit of merits which
averred that about March 1, 1910, the plaintiff agreed to
sell to the defendant all the draught beer used by her
"at the prevailing market price charged by the plaintiff
for said draught beer in the Chicago market;" that from
March, 1910, until November, 1913, she purchased from the
plaintiff 1726 barrels of beer for which she paid \$8 per
barrel; that the market price of the plaintiff's draught
beer of the same quality sold to the defendant during said
period was \$7 per barrel in the Chicago market; that she
did not learn of this until about December 26, 1913; that

2031 A. 334

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

vs.

MR. R. A. HARRIS,
Plaintiff in Error.

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MR. HARRIS' PETITION FOR WRIT OF HABEAS CORPUS

Complaint of the Court.

The Peter Bohnenbaker Brewing Company, a corporation, brought suit against Mrs. W. W. Bohnenbaker for goods sold and delivered, and obtained a judgment for the amount of its claim \$253, to reverse which the defendant prosecuted this writ of error.

Plaintiff alleged that it sold and delivered

to the defendant at her special instance and request certain barrels of beer, at a price of 48 per barrel; that certain payments were made by the defendant, and that there was still due and unpaid \$253.

The defendant filed an affidavit of denial which averred that about March 1, 1910, the plaintiff agreed to sell to the defendant all the quantity then on hand of beer "at the prevailing market price charged by the plaintiff for said quantity then in the Chicago market;" that from March, 1910, until November, 1912, the defendant from the plaintiff took barrels of beer for which she paid 48 per barrel; that the market price of the plaintiff's product at the time plaintiff sold to the defendant during said period was 48 per barrel in the Chicago market; that she did not learn of this until about November 25, 1912; that

she had, therefore, ever paid plaintiff \$1168, and did not owe the plaintiff any money; but on the contrary the plaintiff was indebted to her in the sum of \$1168. Defendant also filed a claim of set-off setting up substantially the same matters.

When the case came on for trial on June 8, 1915, the set-off was withdrawn and the court entered an order finding that the defense interposed was an affirmative one and therefore the burden was on the defendant to maintain it. The defendant was ordered by the court to produce her evidence in support of her affidavit of merits, which she refused to do, and because of such refusal, the court entered judgment in favor of the plaintiff for the amount of its claim. Afterwards on June 19th, this order was set aside and vacated by the court, and on motion of the plaintiff judgment was entered on the pleadings in favor of the plaintiff.

apl
Counsel for plaintiff contends that as the defendant in her affidavit of merits admitted the receipt of the beer "for the price of which the action was brought and pleaded payment, it was unnecessary for the plaintiff below to introduce evidence of the delivery of the goods and the acceptance of the same;" that it was unnecessary for the plaintiff to prove the nonpayment of its claim to establish its cause of action; but that the defense of payment interposed by the defendant is an affirmative defense, which she must prove.

ment
It is true that where the defendant admits the receipt of the goods and the price claimed by the plaintiff and interposes as a defense that payment has been made, proof of nonpayment by the plaintiff is unnecessary to

she had, therefore, over paid plaintiff \$1123, and did not owe the plaintiff any money; but on the contrary the plaintiff was indebted to her in the sum of \$1123. Defendant also filed a claim of set-off setting up substantially the same matters.

When the case came on for trial on June 3, 1915, the set-off was withdrawn and the court entered an order finding that the defense interposed was an affirmative one and therefore the burden was on the defendant to establish it. The defendant was ordered by the court to produce her evidence in support of her affidavit of merits, which she refused to do, and because of such refusal, the court entered judgment in favor of the plaintiff for the amount of the claim. Afterwards on June 15th, this order was set aside and vacated by the court, and on motion of the plaintiff judgment was entered on the pleadings in favor of the plaintiff.

Grounds for plaintiff's claim are that the defendant in her affidavit of merits admitted the receipt of the goods "for the price of which the action was brought and pleaded payment; it was unnecessary for the plaintiff before to introduce evidence of the delivery of the goods and the receipt of the same; that it was unnecessary for the plaintiff to prove the nonpayment of the claim to establish its cause of action; but that the defense of payment interposed by the defendant is an affirmative defense, which she must prove.

It is true that where the defendant admits the receipt of the goods and the price claimed by the plaintiff, and interposes as a defense that payment has been made, proof of nonpayment by the plaintiff is unnecessary to

establish a cause of action, but the burden of proving payment is on the defendant. Baldwin v. Clock, 68 Mich. 201; 30 Cyc. 1264. To the same effect are Hanke v. Gobiakoy, 57 Ill. App. 268; Harley v. Harley, 57 Ill. App. 138; Price v. German Exchange Bk., 60 Ill. App. 418.

Grant
Defendant in her affidavit of merits alleged that she had purchased 1726 barrels of beer for which she was charged by the plaintiff \$8 per barrel; that the price was to be the market price which was \$7 per barrel or \$12,082; that she had paid the plaintiff \$13,250 and had, therefore, over-paid him \$1168. From the foregoing it clearly appears that the price to be paid for the beer was in dispute, and therefore under the authorities above cited, the burden was upon the plaintiff to prove the price at which the beer was sold to establish his cause of action. The judgment of the Municipal Court of Chicago will therefore be reversed and the cause remanded.

REVERSED AND
REMANDED.

RECEIVED IN THE DEPARTMENT OF THE ARMY, WASHINGTON, D. C., JANUARY 10, 1900.

1941-1942

1941: 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 26

• C10 • C6A • FRI 30 • 1979 •

このように、 α は、 β の値に依り、 $\frac{1}{\alpha}$ が $\frac{1}{\beta}$ より大なるか小なるかに依り、 α は β より大なるか小なるかに依る。

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

[illegible]

to the extent that the Government is not aware of any other persons who have been or may be involved in the same or similar activities.

...and

CONFIDENTIAL

There are three main types of...

このように、この論文は、その論議の中心を、「日本と中国の政治的関係」に置いた。これは、「日本と中国の政治的関係」が、この論文の主題であることが、この論文のタイトルから読み取れる。

AND THE BUREAU OF THE ARMY OF THE UNITED STATES

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

[illegible]

2017/05/25 5:21 PM

432 - 21431.

EMILY GUSTAFSON and VERNON
GUSTAFSON, a Minor, who sues
by EMILY GUSTAFSON, his mother
and next friend,

Appellees,

vs.

ROBERT PETERSON and WILLIAM
SCHAEFER,

Appellants.)

203 I.A. 242

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE GOODWIN delivered the opinion of the court.

X
Appellants seek the reversal of a judgment against them, in favor of appellees, for \$2,500, entered in an action on the case, brought under the provisions of section 9 of the Dram Shop Act, for damage to their means of support. (2.4.4)

The evidence offered on behalf of appellees tended to show that appellants, who were saloon keepers, had sold intoxicating liquors to one Carl Gustafson, the husband of one, and the father of the other appellee; that as a result he had become an habitual drunkard and had contributed less and less to their support and had finally ceased to contribute to it at all. The evidence in their behalf further tended to show facts and circumstances which, if true, would sustain a finding that sales of liquor to Gustafson were made under circumstances which would justify the allowance of punitive damages. The testimony on behalf of appellants, however, tended to show that they had expressly refused to sell Gustafson liquor while he was intoxicated or at any time after they had learned that he was accustomed to become intoxicated, and may further fairly be said to be to the effect that they had not caused his intoxication, or sold liquor to him while he was intoxicated. There was also testimony on behalf of

2031.A.242

422 - 2181

RECEIVED
FEBRUARY 1967

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535
TO : DIRECTOR, FBI
FROM : SAC, NEW YORK (100-100000)
SUBJECT: [REDACTED]
RE: [REDACTED]

RE: NEW YORK REPORT DATED FEBRUARY 1, 1967, RE: [REDACTED]

Enclosed for the Bureau are two copies of a letterhead memorandum (LHM) dated and captioned as above. The LHM contains information received from [REDACTED] on February 1, 1967, regarding the activities of [REDACTED] in New York City. The LHM also contains information regarding the activities of [REDACTED] in New York City. The LHM is being furnished to the Bureau for information.

The LHM contains information regarding the activities of [REDACTED] in New York City. The LHM also contains information regarding the activities of [REDACTED] in New York City. The LHM is being furnished to the Bureau for information.

The LHM contains information regarding the activities of [REDACTED] in New York City. The LHM also contains information regarding the activities of [REDACTED] in New York City. The LHM is being furnished to the Bureau for information.

The LHM contains information regarding the activities of [REDACTED] in New York City. The LHM also contains information regarding the activities of [REDACTED] in New York City. The LHM is being furnished to the Bureau for information.

The LHM contains information regarding the activities of [REDACTED] in New York City. The LHM also contains information regarding the activities of [REDACTED] in New York City. The LHM is being furnished to the Bureau for information.

appellees that Gustafson had been seen in an intoxicated condition subsequent to the days on which it was shown that he obtained liquor from the appellants, and also at times subsequent to the filing of this suit, and that when drunk, his attitude toward his wife and child was abusive.

cd The admission of the evidence in regard to what happened subsequent to the times when appellants were charged with having sold liquor to Gustafson, as well as the testimony as to his attitude toward his wife and child, when intoxicated, the appellants contend was erroneous. It is further contended that the court erred in giving some of the instructions offered on behalf of appellees, and in refusing to give some of the instructions offered on behalf of appellants, and that for these reasons, the judgment should be reversed.

< So far as the evidence as to Gustafson's intoxication subsequent to the times when appellants were supposed to have sold him liquor, and at times subsequent to the beginning of this suit is concerned, we think it is sufficient to say that the gravamen of this action is injury to appellees' support, through causing the intoxication of the husband and father, and the evidence in the case offered on behalf of appellees tended to show that as the result of such intoxication, Gustafson became an habitual drunkard; the evidence of these latter occasions on which he was alleged to have been intoxicated, tends to substantiate this, and to show the continued effects of appellants' alleged wrongful acts and the continued injury to appellees' support resulting therefrom. Clearly, appellees' right to recover was not confined to the damages which they had suffered up to the time when suit was brought, since the wrongful acts complained of give rise to but one cause of action, and in it,

2

10

all damages flowing from these acts must be recovered, if they are recovered at all; consequently, appellees were entitled to show that they had suffered, as the result of the wrongful acts complained of, loss of support subsequent to the time when the action was begun, and any evidence fairly tending to show this, was, of course, properly admissible.

The other evidence relied upon as erroneously admitted, appears in the testimony of the appellee Emily Gustafson, and was as follows:

Q - "What was his attitude toward you and the boy when he was drunk?"

A - "He was abusive. He was very abusive."

This testimony was, of course, inadmissible for the purpose of showing damages by reason of any injury to appellees' feelings, but it was introduced in connection with a description of Gustafson's conduct when drunk which was offered for the declared purpose of showing the nature and extent of his intoxication; as it was competent for that purpose, it cannot be said to have been erroneously admitted in evidence.

We do not think the case is similar to the cases of Hackett et al v. Smelsley, 77 Ill. 109, McLees v. Niles, 93 Ill. App. 442, and Adams v. Jurich, 160 Ill. App. 522, where the testimony was not at all confined to evidence tending to show the extent of the husband's intoxication. In the Hackett and Adams cases, evidence of personal injuries and other matters which was both inadmissible, and of a kind which would naturally inflame and prejudice the jury, was introduced. In the McLees case, which is claimed to be most nearly in point, the complainant's testimony was that the husband was "ugly and abusive;" that his language was "very low and abusive." "When asked as to what led to her

[illegible]

Not only did the FBI fail to inform the public of the results of the investigation, but it also failed to inform the public of the results of the investigation.

1 - The new situation. In the new situation,
the for men in the country
2 - There was a little trouble for me

[illegible][illegible]

'final leaving of him,' she stated, 'about two weeks before he was very abusive and was under the influence of liquor.'" It must further be borne in mind that the court, in that case, on its own motion instructed the jury that they could consider this evidence "in determining the extent of the injury," thereby calling special attention to it. The abusive language of McLees' did not tend to injure the wife's means of support, and the court's action in instructing the jury that it could be considered in determining the extent of her injury was, of course, clearly erroneous. Moreover, in the case at bar, the appellants moved to strike the testimony on the sole ground that it was not material to any issue in the case; they did not suggest that it was prejudicial or ask that it be stricken out on that ground.

The court gave eight instructions on behalf of appellees; appellants offered forty-seven instructions, of which the court gave twenty-three. Counsel for appellants criticise each of the eight instructions given on behalf of appellees, and also the court's action in refusing to give three of the fourteen instructions rejected. [The first instruction given on behalf of ^{defendants} ~~appellants~~ is ^{now} as follows:

"The court instructs the jury, as a matter of law, that it is unlawful to sell or give intoxicating liquors to an habitual drunkard or to a person when intoxicated, and you are further instructed that a sale to such person is a sale wantonly and wilfully made; so if you believe from the evidence that intoxicating liquors were sold or given to Carl Gustafson by the defendants at the time when they knew, or ought to have known, that the said Carl Gustafson was intoxicated or had become an habitual drunkard, then such sales or gifts, if any, were unlawful."

It is objected that this instruction permitted the jury to find that sales were made wantonly and wilfully, even if the appellants did not know, or had no means of knowing,

"final finding of fact," she stated, "about the whole matter
be all very simple and not require the influence of a jury."
It must appear to her that the jury, in that
case, on the one hand, had to find the fact that they could
conclude this evidence "is sufficient to establish the fact of the
injury," thereby relieving the jury of the burden of the
evidence of violence, did not seem to require the jury's action
of opinion, and the court's action in the matter was not
that it could be considered as having been asked to do
in any way, of course, clearly erroneous. However, in the
case at bar, the jury's action was to find the fact that the
the case found that it was not necessary to find that the
case; they did not require that it was necessary to find
that it be struck out on that ground.

The court gave slight indication in regard to
appeal; appellate review of the jury's action, of
which the court gave indication. However, the appellate
action each of the state's action in the matter is
appellate, and also the court's action in the matter is
review of the court's action in the matter is
review of the court's action in the matter is

The court indicated the jury, as a
matter of fact, that it is necessary to find
on the evidence presented to the jury, as indicated
by the court, that the jury's action is not
and you are therefore instructed that you will
to find the fact that the jury's action is not
this matter; as the jury's action is not
found that the jury's action is not
then to find the fact that the jury's action is not
the jury's action is not, as the jury's action is not
found, that the jury's action is not
[The court's action in the matter is not
then made clear in the jury's action.]

It is objected that the jury's action is not
that the jury's action is not, as the jury's action is not
the appellate court's action in the matter is not

that Gustafson was intoxicated or an habitual drunkard. The instruction, however, consists of but one sentence, and the portion of it beginning with the words, "so, if you believe from the evidence," made it necessary for the jury to find that the appellants knew, or ought to have known, that Gustafson was intoxicated or had become an habitual drunkard, before any recovery could be had at all.

< We do not see how any meaning can be read into the instruction other than that in order to constitute a sale wantonly and wilfully made, the jury must find that the appellants knew, or ought to have known, that Gustafson was intoxicated or had become an habitual drunkard. Counsel also object to the conclusion that, "such sales or gifts, if any, were unlawful," and contend that the unlawfulness of the sales was not an issue in the case, and that it clearly was introduced to prejudice the jury against the appellants. We are, however, of the opinion that this action is based entirely upon the alleged unlawful acts of the appellants, and that, therefore, the lawfulness or unlawfulness of appellants' conduct was the principal issue involved in the cause.

cd The second instruction, in effect, told the jury that the defendants were liable for the acts of the defendants' servants, and the instruction was admitted to be correct ordinarily, but it is said it is not correct where exemplary damages are involved. This instruction will, therefore, be considered in connection with the instructions on exemplary damages.

cd The third instruction given on behalf of appellees is criticised because "it does not limit the time when the defendants gave or sold intoxicating liquors to Mr. Gustafson to the time alleged in the declaration, and there is evidence

that situation was introduced in the original document.
The instruction, however, contained in the original document,
and the portion of it beginning with the words "and if"
you believe from the evidence," and if you believe from the
evidence to find that the appellant is guilty of the crime
known, that instruction was introduced in the original document
without amendment, before any amendment was made to it.
It is not as if any amendment was made to the instruction
other than that it was amended in some respects in the original
and finally made, the jury does find that the appellant
knows, or ought to know, that the instruction was introduced
or had passed an original document. It would also object to
the conclusion that "such a case as this, it may, with the
jury," and conclude that the instruction of the case was
not an issue in the case, and that it is clearly an issue
known to introduce the jury against the instruction. It
is, however, of the opinion that this action is based on
the fact upon the alleged material facts of the appellant,
and that, therefore, the instruction is introduced in
original document was the original document, and in
the case.

The second instruction, the jury, told the jury
that the defendant was liable for the acts of his defense-
men, servants, and the instruction was amended to be more
clearly understood, but it is not necessary to say
expressly changes are involved. The instruction will,
therefore, be considered in connection with the instruction
on secondary damages.

The third instruction given to the jury to decide
is contained therein as does the fourth. The fifth and sixth
instructions are as follows: "The defendant is liable for the acts of his defense-
men, servants, and the instruction was amended to be more
clearly understood, but it is not necessary to say
expressly changes are involved. The instruction will,
therefore, be considered in connection with the instruction
on secondary damages."

in the record that Gustafson was drunk as late as two months before the trial of the case." The criticism is not valid, since there was no evidence of sales by either defendant other than those set out in the declaration, and the instruction expressly limits the jury to the sales shown by the evidence. The instruction is further criticised because it is alleged to allow a recovery for intoxication, even if it was not habitual, and it is said that the gravamen of this action was habitual intoxication. The statute, however, gives an action for damages resulting from intoxication, "habitual or otherwise," and consequently, the gravamen of the action is intoxication, and evidence which established intoxication would, therefore, support a verdict, even if it was not shown to be habitual. Where enough is proved to establish a right of action, it is no objection that more was declared upon, for the matter not proved may be treated as surplusage. The final criticism of this instruction is that it allowed a recovery for injury to appellees in their property or means of support, while the declaration only counted on injury to the latter. However, as the jury, in this instruction, are confined to what they "believe from the evidence," and as there was nothing in the evidence tending to show injury to property, the presence of the words, "in their property," does not make the instruction erroneous.

The criticism of appellees' fourth instruction is that it allows a recovery for whatever lessened Gustafson's ability to supply his family with suitable comforts, even though they might believe he had not actually failed so to supply them. We think no jury, however ingenious, could have evolved such an extraordinary meaning out of the very plain words of the instruction.

The objection made to the sixth instruction was also made to the third, and has been fully answered.

The seventh instruction is criticised because it told the jury that if they believed from all the circumstances in evidence that plaintiffs ought to recover exemplary damages, they might, if they saw fit, in addition to the actual damages, assess such further sum as exemplary damages as they believed from all the circumstances in evidence in the case that plaintiffs were entitled to. This is objected to because it does not explain to the jury in what circumstances exemplary damages were allowable. This objection, we think, is clearly not well taken, for the instruction correctly lays down a principle of law applicable to the assessment of damages in this case. It is true it did not tell the jury in what circumstances exemplary damages were allowable, and did not attempt to do so, but left that subject matter to be dealt with in the instruction which followed. It is not necessary nor customary to attempt to state all the principles of law relative to one subject matter in one instruction. The instruction which follows, undertakes to, and does, correctly define the facts and circumstances which would warrant the giving of exemplary damages, and the proper measure of such damages. In connection with this instruction eight, it is necessary to consider the criticism made in regard to the second instruction, which told the jury, in effect, that the acts of the appellants' servants were the acts of the respective appellants; it is contended that this would subject the appellants to exemplary damages, even though the appellants had forbidden the sales. We think that this criticism is not only far-fetched, but that it is not even technically correct, for the court nowhere attempted to tell the jury when

The opinion was to the effect that the

Also note to the Editor, we have been told that...

71-60899 Submarine cable; refueling station; Panama

- This is not LL, which would have been at least 20% blot

very hard, they want it in all the

Reference is made to the letter of 10 May 1988, and the letter of 12 May 1988.

5-10-1977

There is no other person named in the document.

and all other information that may be required by the Department.

၁၉၆၄ ခုနှစ်၊ ဇူလိုင်လ ၁၅ ရက်နေ့တွင် ဘဏ္ဍာရေးဝန်ကြီးရုံးတွင်

... ..

* Approved by the Director & sent to the Commission

the amount of damage in this case. It is not in the

and the other side of the road.

Just the same as at my daughter's for the big one, sidewalks were

(Signature)

2011年12月15日 星期三 11:11

—The system has no system and no information on it.

also has been used to estimate the level of protection.

...for the exhibition held in regard to the ...

and the other two are the same as in the first case.

Journal of the American Statistical Association

to be a subject for the study of the

For the purpose of this study, the following hypotheses were formulated:

... ..

1968-1969

exemplary damages could be recovered, except in the eighth instruction, and it there makes such damages depend upon a finding "that the conduct of the defendants in this regard was wanton and in wilful disregard of the plaintiffs' rights." The acts of appellants' servants did not constitute the conduct of appellants; one's conduct is personal, and depends upon personal acts. The instruction did not tell the jury that they could make an example of the appellants on account of the acts of their servants, but did tell them they could do so if their own conduct was wanton and in wilful disregard of appellees' rights. We think the giving of the second instruction, which is admitted to be correct as a matter of law, had no tendency to mislead the jury, when read in connection with the eighth instruction, which correctly instructed the jury in regard to exemplary damages.

Appellants further contend that the court erred in failing to give the second instruction offered by them in regard to exemplary damages, which, in effect, told the jury that if one defendant was guilty of conduct which would permit exemplary damages, and the other was not, then they could only assess "such damages as you find the defendant least at fault is liable for." Had the instruction told the jury that if the conduct of only one of the defendants warranted the assessment of exemplary damages, then only actual damages could have been recovered, the instruction would have been substantially correct, but the use of the words, "the defendant least at fault," made the instruction offered ambiguous and misleading, and might, in the minds of the jury, refer to the number of times drinks were sold by the one or the other, or the quantity sold. The instruction was, therefore, properly refused.

everybody knows, could be reversed, even in the most
extreme cases, and so there would be no danger of
violence. That the removal of the Government in this manner
was wanted and its effect was to be the same as that
of the removal of the Government, and so it was not necessary to
act of legislation, one's conduct is governed, the danger
upon personal acts. The Government has not left the
that they could take in exercise of the executive or judicial
of the acts of their executive, and the fact that they could
do so if their own conduct was not to be left alone
kind of legislation, "rights". In this the Government of the
instruction, which is subject to be removed as a matter of
law, and so necessary to obtain the law, was not to be
action with the right legislation, which is necessary for
action, and they in regard to legislative action.
Appellate Court has not left the same power
to them to give the same power, which is subject to be
regard to executive action, which is subject to be
law, that it was necessary to give to executive action, which
would be necessary to give, and the other was not, that they
could only remove "such matters as you find are necessary"
fact of fact is that it is not necessary to give the
law, that it is subject to be removed, or only that of the
action, the Government of the Government, that they could
action could have been removed, the Government could have
been substantially removed, but the fact is that they
Government is not in fact, "such matters as you find are necessary"
action and legislation, and action, in the sense of law
law, refers to the removal of the Government, and so it was
not of the Government, and the Government was not
therefore, properly removed.

The eighth instruction offered was also properly refused, since it told the jury that they should not consider habitual intoxication of Gustafson at any time or period other than the time or period during which it was proven by the evidence that the defendants or either of them sold or gave intoxicating liquors to him. That habits of intoxication, when once formed, have a tendency to continue, is a matter of common knowledge, and therefore it would have been improper to exclude from the jury's consideration evidence of intoxication subsequent to the time when it is shown that the defendants sold or gave intoxicating liquors to Gustafson.

The twelfth instruction offered by appellants was to the effect that no recovery could be had unless habitual intoxication was shown. We think, however, as indicated above, that under the declaration recovery could have been had for damages caused by intoxication, even though it had not been shown to be habitual.

As there appears to be no error in the rulings of the court, either in regard to the admission of evidence or the giving or refusing of instructions, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

7

It should be noted that the above information is for information only and is not to be used for any other purpose.

LOUIS WEISS,
Plaintiff in Error,

vs.

MAX GLAMITZ, AMELIA GLAMITZ,
Defendants in Error.)

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error, who was the plaintiff below, seeks to reverse a judgment against him for costs, and to obtain judgment here for \$200.00, which was the amount deposited by him as earnest money under a contract for a sale of certain property therein described. ^{The} ~~That~~ contract provided, among other things, that the land should be subject to an incumbrance of \$3,500, of which \$500.00 was to be payable in July, 1913, and the balance in 1917. Upon an examination, it appeared that the property was subject to an incumbrance of \$3,500, of which \$500.00 was payable August 7, 1914, \$500.00 August 7, 1915, and the balance in 1917, which was, of course, materially different from the incumbrance agreed upon. It further appears that the plaintiff in error gave notice to the defendants in error that he elected to stand on his contract, and must have a conveyance subject only to the incumbrance therein provided for. No such conveyance was tendered.

Parol evidence on behalf of defendants in error was offered, which tended to show that plaintiff in error agreed to a modification of the contract, and this evidence was received over the objection of plaintiff in error, apparently upon the theory that it was evidence of a waiver of a stipulation in the contract. We are, however, of the opinion that an agreement to change the terms of a contract so as to permit an incumbrance materially different from the one originally provided for, cannot, in any sense, be said to be a waiver of a condition, and that the offer of parol evidence of such an

AS. T. 602

1891 - 1892

RECEIVED

. 27

THE UNIVERSITY OF CHICAGO
CHICAGO, ILL.

... to

The Director is aware, however, that the information is not available to the public.

Now, these are all things that I am sure you will find very interesting.

Amount of the loan, \$100,000, not secured, with a

[illegible]

- 17 -

03 304796 ad 810000 3-11 1000 J 1st , right's room & window , ceiling

by introduction of 100,000, which was to be paid

At this time, the following information was obtained:

The Government of the United States of America, and the Government of the State of New York, do hereby certify that the foregoing is a true and correct copy of the original as the same appears in the records of the State of New York.

00.000 00.000 00.000 00.000 00.000 00.000 00.000 00.000 00.000 00.000

[illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

— 100 —

... ..

Business Journal Publishing Inc. 1000 14th St. N.W. Washington, D.C. 20004

... ..

[illegible]

-3- The Committee also has, however, not to mention a

Information, known or likely to be known and have been

Upon the theory that it was necessary to a full understanding of the theory of the

2000-2001

[illegible]

Incubation normally finished 10 days.

1. The first step is to identify the problem or goal. This involves understanding the current situation, identifying the problem, and setting a clear goal.

It must be admitted, however, that the fact that the

< agreement is an obvious attempt to vary the terms of a written document by parol. Such evidence is clearly inadmissible for such a purpose. (Becker v. Becker, 250 Ill. 117.) The plaintiff in error was not in default, and as no offer of performance was made by the defendants in error within the time stipulated for in the contract, he was entitled to recover the earnest money deposited. In view of the fact that there is no dispute in regard to that amount, the judgment of the Municipal Court will be reversed and judgment entered here for \$200.00 and interest at five per cent. from February 20th, 1915, when the judgment in the Municipal Court was entered.

REVERSED AND
JUDGMENT HERE.

100-100000

-2-

Agreement to be given effect to any and all of the
written contracts of the company. Such evidence is given by
the undersigned for and in support of (Section 4, Article 1, 1911)
the Company in which the same was not in effect, and
as no other or better evidence was made by the defendant in
any within the time allowed for in the contract, he
was entitled to recover the amount of the contract.
view of the fact that there is no change in the
contract, the judgment of the majority of the court
and judgment entered for \$100.00 and interest to the
date of the judgment. The judgment of the court is
the judgment of the court was entered.

WITNESSES:
JAMES H. HARRIS

88 - 21474.

G. E. CLINTON,

Defendant in Error,

vs.

RHODA ROYAL,

Plaintiff in Error.

203 I.A. 248

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error seeks to secure the reversal of a judgment entered against him on a directed verdict, on two judgment notes ^{for \$250 each} drawn by him and made payable to one Seaver, and by him endorsed in blank. The evidence discloses that the notes were placed in the hands of defendant in error by her husband after maturity, and for no consideration whatever. It therefore clearly appears that so far as she is concerned, she is charged with notice of any defenses pleadable against the payee, unless she gained her title to the notes from a person standing in the position of a bona fide purchaser for value without notice. A careful examination of the record, however, fails to show that there was any intermediate endorsee: the husband of defendant in error did not testify that he had ever been the owner of the notes, and the evidence as a whole tends strongly to show that in turning them over to her, he was acting for the payee. In no event, moreover, could it be said that the evidence showed him to be an intermediate endorsee so conclusively as to warrant the judge in giving a peremptory instruction, if the question of whether he was or was not, was a material element in the case. For the purpose of determining whether the judgment upon the directed verdict may be affirmed, it is necessary, therefore, to proceed upon the theory that the defendant in error did not stand in the position of a bona fide purchaser for value, without notice, since the evidence is plainly insufficient to sustain a peremptory instruction

based upon the assumption that she did.

The notes in question were judgment notes signed by the plaintiff in error, and on the back of each, appeared the following order:

"Chicago, Ill. March 14th, 1914.

Treasurer,

Young Buffalo Wild West Co.

Please pay to the order of Vernon C. Seaver Two Hundred and Fifty (\$250.00) Dollars, and charge same to my 1913 account.

Rhoda Royal."

The date and the amount named in these orders are identical with the date and the amount named in the promissory notes

~~The plaintiff in error~~ ^{defendant} testified that the Young Buffalo Wild West Company owed him \$1,700 for services during the year 1913; that he considered Seaver as the owner of the show; that he had done all his business with him; that at the time the notes were made, Seaver gave him \$500.00 on account, and expressly agreed to look to the show for reimbursement, and that ~~plaintiff in error~~ ^{defendant} would not have to pay the notes; that he (Seaver) would get the \$500.00 from the show; that the ~~plaintiff in error~~ ^{defendant} was about to attach the show for the amount due him, and that Seaver advanced the \$500.00 with the tacit understanding that the attachment would not be made, and that it was not made, and that he credited the account of the show with the \$500.00 which he had received. All of this testimony was stricken out. Counsel for ~~plaintiff in error~~ ^{defendant}

^{also} ~~error~~ made the ##### following offer:

"Your Honor, I want to show the schedules filed and sworn to on behalf of the Wild West Company, a corporation in bankruptcy, that they scheduled their indebtedness to this defendant at \$1200. showing the payment less the \$500 which appears upon these notes."

This offer was objected to, and the evidence excluded as immaterial.

marked upon the map of the city.

The name in question was found upon
signed by the district in error and on the map of the
appears the following words:

Washington, D.C. 20001
The name in question was found upon
signed by the district in error and on the map of the
appears the following words:

The name in question was found upon
signed by the district in error and on the map of the
appears the following words:

case

The name in question was found upon
signed by the district in error and on the map of the
appears the following words:

The name in question was found upon
signed by the district in error and on the map of the
appears the following words:

AA
1642

The contention that the notation upon the back of the notes rendered them conditional, is untenable, since it clearly falls within section three of the Negotiable Instrument Law of 1907, which provides that "An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with: (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount." (Hurd's Rev. Statutes, 1913, p. 1676.)

We are further of the opinion that the testimony of ~~plaintiff in error~~^{defendant} in regard to the conversation had at the time the notes were executed was inadmissible for the purpose of varying the terms of the notes themselves, or of showing an agreement that ~~plaintiff in error~~^{defendant} would not be liable according to their terms. (Miller v. Wells, et al., 46 Ill. 46; Mumford v. Tolman, 157 Ill. 258; Hensley v. Mitchell, 147 App. 161; Stozky v. Robe, et al., 189 Ill. App. 540.) While the rule laid down in these authorities unquestionably works a hardship in many cases, there is no doubt about the soundness of the reasons which induced its adoption, or of its applicability to the present case.

We are, however, of the opinion that the court erred in excluding the documentary evidence offered for the purpose of showing that the schedules filed showed that the indebtedness to the plaintiff in error had, by the payment of \$500.00, been reduced from \$1,700 to \$1,200, especially in view of the undisputed testimony to the effect that the entire management and control of all the affairs of the bankrupt company were in the hands of the payee of the note. The order upon the back of the notes entitled the holder to receive from the treasurer of the company the full face value

The contention that the contract was made on the basis of the notes rendered then conditional, is untenable since it clearly falls within the scope of the unconditional instrument law of Iowa, which provides that "an unconditional order or promise to pay is unconditional either the making of this act, though coupled with (1) an indication of a particular fund out of which payment is to be made, or a particular account to be debited with the amount," (Iowa Rev. Statutes, 1919, § 1070.)

We are further of the opinion that the testimony of Plaintiff's witness is not to the effect that the notes were executed and transferred for the purpose of varying the terms of the notes themselves, or of securing an agreement that ~~the notes would not be paid~~ according to their terms. (Heller v. Heller, 231 Ill. 481; 40; Wentz v. Colson, 137 Ill. 222; James v. Wilson, 117 Ill. 101; Stacy v. Stacy, 22 Ill. 222; Wm. 240.) While the rule laid down in these authorities represents a hardship in many cases, there is no doubt about the soundness of the reason which founded the adoption of the applicability to the present case.

We are, however, of the opinion that the record is not sufficient to establish that the defendant intended to defraud the plaintiff. The evidence shows that the defendant intended to pay the plaintiff in cash and, in the payment of \$200.00, cash received from \$1,700 to \$1,500, especially in view of the undoubted testimony to the effect that the entire amount was received at all the times of the transfers. The company was in the hands of the state of Iowa at the time of the transfers, and the order was made on the basis of the order, which the order is negative from the transaction of the company and the fact that

of the notes, and if the payee did receive the funds in accordance with the terms of the orders, this acted as payment of the notes. The payee could not, of course, credit the company's indebtedness to the plaintiff in error with the payment of \$500.00, without extinguishing the notes upon which the orders were endorsed. While a bankruptcy schedule stating the indebtedness to be \$1,200, instead of \$1,700, was not, of course, conclusive, it was some evidence, at least, that the credit had been made and therefore it should have been admitted. For this reason, we are of the opinion that the case must be reversed and remanded to the Municipal Court for a new trial.

REVERSED AND REMANDED.

100 - 21490.

203 I.A. 250

BRIDGET CORRIGAN,

Defendant in Error,

vs.

NORTH AMERICAN UNION,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

X
cd
The plaintiff in error seeks the reversal of a judgment against it, entered in favor of defendant in error, on a benefit policy issued to one George Whelan. The substance of the defense was that the policy was issued subject to the rules of plaintiff in error, which prohibited its members from engaging in the occupation of bartender; that the insured had, during several months engaged in that occupation, and that in consequence, the policy was void. At the close of the evidence plaintiff in error asked the court to find that the insured had "engaged in an occupation prohibited by the laws of the defendant, namely, a bartender, while he was a member of the defendant." This the court refused to do. It is contended that this action of the court was erroneous. The testimony offered on behalf of plaintiff in error tended to show that at times during the months of February, March, and April, 1913, the insured had served intoxicating liquors in the saloon of his brother. Numerous witnesses were called on the other side, whose testimony tended to show that he had not done so. While this latter evidence was largely of a negative character, the testimony of the insured's brother, who was the owner of the saloon, was that his brother was not engaged in his saloon; that he never employed him as a bartender or paid him wages or salary as bartender; that he was, during the months described, "hanging around" in his saloon; that he did not serve any

drinks with his knowledge; that he (the witness) tended bar himself; that he never saw the insured serving any drinks at the bar; that he was there every day; that the condition of the insured's health at that time was such that he was just able to sit up; that he never authorized his brother to go behind the bar and sell beer; that he had a bartender in his employ during all those months, and that the insured would come into his saloon once or twice a day, and not at any definite hours. As the witness was the proprietor of the saloon, and in active charge of it, he was in a position to have definite information in regard to the matter. In view of this testimony, we are unable to say that the trial judge, who heard the witnesses, erred in failing to find that the insured had engaged in the prohibited occupation.

We are unable to say that casual sales of liquor, made from time to time in a brother's saloon by one not employed for the purpose and receiving no compensation therefor, would, as a matter of law, constitute the one who made the sales a person engaged in the occupation of bartender. As no other assignment of error is relied upon, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

beginning with his knowledge that he (the witness) could not
himself find the paper and the witness could not find
at the time that he was there every day that the condition
of the house was such that it was not possible for him
just alone to find out that he never mentioned the paper
to or behind the bar and still there; that he did a business
in his employ during all those months, and that the witness
would come into his office once or twice a day, and that he
any daily business, as the witness was too busy to
the witness, and in active charge of it, he was in a position
to have noticed the paper in regard to the paper. It
was of this testimony, he was unable to say that the witness
found the paper and the witness, and it is not possible to find
that the witness had noticed the condition of the house.
He was unable to say that the witness had noticed the paper
and that the witness had noticed the paper in one way or another
for purposes and conditions of the paper, and that
in a matter of fact, conditions of the paper were the same
a person engaged in the conduct of business, he was
able to find out that the paper was not there, and that the
the witness could not find it.

161 - 21553.

203 I.A. 251

EDWARD HUDSON,
Defendant in Error,

vs.

BEN MARKS, D. S. MARKS,
EMANUEL MENDELSON and
I. LIPSEY,
Plaintiffs in Error.)

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

X

The plaintiffs in error sued out this writ for the purpose of reviewing the action of the Municipal Court in denying their motion to vacate a judgment against them, entered by confession under a power of attorney, reserved to the defendant in error in a lease. The only defendants in the court below who made a motion to set aside the judgment, were the lessees. [It appears from the lease that it was assigned, with the consent of the lessor, ^{defendant} who is the defendant in error ^{defendant} here, to the plaintiff in error Mendelson, and afterwards re-assigned to plaintiff in error Lipsey, but by the terms of the assignment, the original lessees remained bound by the terms of the lease. The affidavit upon which the lessees ^{defendants} (plaintiffs in error) based their motion set out that the assignees of the lease used the premises as a house of ill fame; "that the use of said premises by said Lipsey and by said Mendelson for such immoral and illegal purposes was with full notice and knowledge thereof on the part of the plaintiff herein; that the plaintiff accepted certain payments of rent knowing the money so paid to him was the proceeds of the unlawful and immoral uses to which said premises were devoted as aforesaid."]

Plaintiffs in error contend that the matters thus set up constituted a defense to the action on the lease, and that the Municipal Court should have opened up the judgment for the purpose of allowing that defense to be made. While it is true that it is a defense to an action on a lease or other contract

ch

1803 A.D.

• 111 - 101

THE UNIVERSITY OF CHICAGO

1900-1901

• *Journal of the American Academy of Child and Adolescent Psychiatry* 1999;38:1031-1037

[illegible]

...tumor and the malignant cell survival studies indicate that

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

It should be noted that the following information is not to be used for any purpose other than the one for which it was provided.

— "The 'Hill' is a place of great interest."

ed in connection with a letter of attorney to the

... ..

100-443887-1000

20. The following is a list of the names of the persons who have been named in the above mentioned affidavits as having been in the possession of the same at the time of the same being made.

... ..

... ..

... ..

... ..

...the ... of the ...

1900-1901. The first year of the new century. The first year of the new century.

[Faint, illegible text at the bottom of the page]

From the above, it is seen that the results of the analysis are in good agreement with the results of the analysis of the data of the other two experiments.

Downloaded from <http://ajphaphapublications.sagepub.com/> at 11:41 11 February 2015

...the

... ..

that it was made for an illegal or immoral purpose, yet, no authority is cited which sustains the proposition that an action on a lease not shown to have been made for an illegal purpose can be defeated by showing that the lessor had received rent with a knowledge that they had been so used. In support of their contention, counsel for plaintiffs in error cite Fields v. Brown, 188 Ill. 111. In that case, however, the lessor leased the premises with a full knowledge that they were to be used as a house of ill fame, and for that reason the court held the lease illegal and non-enforceable. Moreover, the affidavit relied upon here, failed to state that the premises were used for illegal purposes with the consent of the lessor, or that he permitted them so to be used. The recital, "that the use of said premises by said Lipsey and by said Mendelson for such immoral and illegal purposes was with full notice and knowledge thereof on the part of the plaintiff herein," would be true even if his knowledge was acquired on the last day or hour that the premises were used for such a purpose. That he accepted payments of rent, knowing that the money was the proceeds of the immoral uses, is also immaterial in the absence of a showing that he had acquiesced in such use, or permitted the occupants to continue to use it for such a purpose. The action of the court in refusing to set aside a judgment by confession will not be reviewed unless the affidavit upon which it is based sets out facts which, if true, would in themselves constitute a defense. In Chicago Wire Proofing Co. v. The Park National Bank, 145 Ill. 481, the court said, page 487:

"In an application of this character, to vacate a judgment and for leave to plead, affidavits filed in support of the motion are to be construed most strongly against the party making the application. It is not sufficient to state facts from which, if proved on a trial, a defense might be inferred. Crossman v. Wohlleben, 90 Ill. 537."

When tested by this rule, the affidavit appears to be clearly insufficient, and we are, therefore, of the opinion that the trial court did not err in denying the motion to open up the judgment and allow plaintiffs in error to plead.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

199 - 21592.

FRANK ALFORD,
Defendant in Error.

vs.

ANTONIA LAMBERT,
Plaintiff in Error.

203 I.A. 256

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Plaintiff in error seeks to review the action of the Municipal Court in entering judgment against her in favor of defendant in error for \$836.00 claimed to be due for work as janitor for twenty months at \$35.00 a month, and other items, including \$21.00 of borrowed money. Liability for the item of \$21.00 was admitted, but denied as to the remainder.

Defendant in error testified that he built two flues in plaintiff in error's flat building, for which she agreed to pay him \$40.00; that he did some tuck pointing, for which she was to pay him \$15.00, and that he worked for her for twenty months as janitor, for which she agreed to give him \$35.00 a month; that the building had fifteen flats and a basement; that during the twenty months, she gave him his board and room. Plaintiff in error denied that she agreed to pay him anything, and stated that she gave him his board and allowed him to sleep in one of the flats, and that he sat at the table with plaintiff in error and her husband. She testified that her husband worked in the building, fired the furnace, cleaned the steps, and sometimes carried the garbage down.

One Flizikowski, called by the plaintiff in error, testified that he had been an architect in Chicago for twenty years; that he had known defendant in error for forty years, and that defendant in error told him that he was working for his board and lodging, and did not get any wages.

A social worker with the Legal Aid Society testified that defendant in error came to the Legal Aid Society to have suit begun against plaintiff in error; that he told her then that he was working for plaintiff in error at the rate of \$5.00 a month.

✓ The main issue, therefore, was as to whether plaintiff in error had agreed to pay defendant in error anything for his services, outside of his board and lodging, and if so, how much. There was a direct conflict of evidence, and plaintiff in error was entitled to produce any competent evidence which would tend to support her contention. Plaintiff in error called her husband as a witness, and he was asked, "How much work did he do, and how much work did you do?" Objection was made that he was not competent. The court, without directly passing upon that question, said that defendant in error was contending "that he was getting \$35.00 a month, and how much work he did or did not do, does not cut any figure," and sustained the objection. As the matter in controversy concerned the wife's separate estate, her husband was a competent witness. The amount of work which defendant in error did during the twenty months he was with plaintiff in error was a matter which the plaintiff in error had a right to present to the jury for its consideration in determining the probability or improbability of his testimony that she had agreed to pay him \$35.00 a month. We are, therefore, of the opinion that the evidence was improperly excluded, and for that reason, the cause will be reversed and remanded to the Municipal Court for a new trial.

REVERSED AND REMANDED.

227 - 21622.

203 I.A. 257

JOHN FORLER,
Plaintiff in Error,
vs.
E. R. BUTTS,
Defendant in Error.)

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

+ The plaintiff in error brought suit on two promissory notes aggregating \$590.00, and now sues out this writ of error to reverse a judgment in favor of the defendant in error. ~~The evidence disclosed that~~ these checks were given on a Monday, and that plaintiff in error failed to deposit them in the bank in Chicago until Wednesday or Thursday, and that this resulted in a failure to present them to the bank in Niles, Michigan, on which they were drawn until Saturday, the day the bank closed its doors. ~~The evidence also shows that~~ The defendant in error had on deposit with the bank at the time of its failure, an amount in excess of the amount of the checks. The evidence further disclosed that it takes about two and a half hours to travel by rail from Chicago, where the transaction took place, to Niles, Michigan. ~~As the failure of the plaintiff in error to present the checks for payment within a reasonable time resulted in a loss to the maker of the checks, it constituted a payment or extinguishment of the debt for which the checks were drawn.~~ (Brown v. Schintz, 202 Ill. 500.)

apl Plaintiff in error, however, contends^{ed} that as the defendant in error wrote him on the day of the bank's failure, saying that he hoped the checks had been paid, and if not, he, (the defendant, in error) was out that amount, and also in a conversation with plaintiff in error, agreed to give a note for the amount of the checks, that these promises

203 I.A. 257

RECEIVED

NOV 19 1937

NOV - 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

NOV 19 1937

revived defendant ⁱⁿ ~~in error~~'s obligation without any further consideration, and that it was immaterial whether defendant ~~in error~~ knew that by the rules of law the negligence of plaintiff ~~in error~~ to deposit the checks promptly would discharge him.] In support of this contention, counsel cite Morgan v. Peet, 41 Ill. 347, but in that case, the court expressly adhered to the doctrine which it had laid down in the same case when it had previously been before it, reported in 32 Ill. 281, where it had said, page 288:

"The rule, we believe to be, in such case, that if an indorser makes a new promise when he believed he was liable, it is for the plaintiff to prove that he knew the facts which would discharge him, and this knowledge may be shown by facts and circumstances.

"The law presumes that all men know the law, but not the facts; hence a plaintiff seeking to recover in such case must show by sufficient proof of facts and circumstances, or otherwise, that the party sought to be charged on his promise knew the facts of his release."

In Walker v. Rogers, 40 Ill. 278, the court said, page 280:

< | "It is also insisted that the drawers waived the laches by a subsequent promise. The language used was equivocal, but, admitting that the partner who used it intended to be understood as promising payment, there is no evidence that, when he made the alleged promise, he knew that the holder had failed to present the bill at maturity, or to give due notice of non-payment. Unless it appears that the new promise was made with a full knowledge of the facts out of which the discharge of the drawer has arisen, such promise is no waiver. The burden of making this proof is upon the plaintiff."

✓ | The evidence fails to show that at the time the defendant in error made the statements relied upon, he had knowledge of the facts out of which his discharge had arisen; it therefore follows that he was entitled to judgment.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

311 - 21707.

CITY OF CHICAGO,

Defendant in Error.

vs.

J. J. MOSER,

Plaintiff in Error.)

203 I.A. 259

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error, who will be referred to as defendant, seeks to reverse a judgment against him for \$1.00 and costs, entered against him for an alleged breach of section 2012 of the Municipal Code, which, in effect, provides that all persons who shall make, aid, countenance, or assist in making any form of noise, riot, disturbance, breach of the peace, or a diversion tending to a breach of the peace, within the limits of the City of Chicago, shall be subject to a fine of not less than \$1.00 nor more than \$200.00. The sole question before the jury was as to whether the defendant had been guilty of such an offense.

The evidence disclosed that the defendant, on the day in question, presented himself at the entrance to the Kedsie station of the Chicago & Northwestern Railroad, and offered his ticket for inspection, but refused to allow the collector to punch it. It sufficiently appears from the evidence that it was not customary to require a ticket to be punched until the passenger had boarded the train, but that on account of unusual and extraordinary congestion of traffic, collectors were placed at the entrance to the station, and that they punched the tickets of the passengers as they passed through the gates. The defendant passed through the gate, apparently without the use of any force, but declining to permit his ticket to be punched, upon the ground that the railroad company had no right to insist upon a cancellation of a fare until it was apparent that transportation would be

2031.A.259

191 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

1919 - 1919

furnished him.

The first witness called on behalf of the City testified to an occurrence supposed to have happened the previous day. On cross-examination defendant asked the witness when he started to work at the station, which was, of course, proper, in view of the fact that he had testified to an occurrence on the previous morning. When an objection to this question was sustained, defendant said, "This is cross-examination." Thereupon, the court said, "Never mind now. What do you think it is? An oyster stew?" The subsequent examination disclosed that the witness had not seen the occurrence on the preceding day in regard to which he had testified. Thereupon, the defendant moved to strike it from the record, but the court said, "No, it won't be stricken from the record." When the defendant attempted to ask a witness a question on cross-examination, the court interrupted, saying, "What are you trying to do, kill time?" Defendant: "No, your Honor." The Court: "Well, then, why don't you ask the questions?" Defendant: "I am trying to get a record in this case, if your Honor please." The Court: "Never mind the record; ask your questions. Are you getting ready for a damage suit?" Defendant: "No, your Honor." The Court: "Well, then, go ahead. This man told you that he did not see you after the time he saw the officer. Now stop the cross-examination there; we aren't trying the railroad you know." Defendant: "If this jury believes - " The Court: "Never mind what the jury believes; you ought to know how to try this case." Defendant: "But it makes a difference to me - " The Court: "It possibly makes a difference to you. I don't know what difference it makes to you or what it doesn't make to you."

In view of the court's refusal to strike out the hearsay evidence admitted on behalf of the City, and the obviously improper and prejudicial remarks of the presiding judge, it is necessary to reverse the judgment of the Municipal Court, but upon a review of all the evidence in the case, we are clearly of the opinion that no evidence was introduced which could fairly be said to establish the charge of a violation of the ordinance in question. The defendant, in possession of a ticket which entitled him to become a passenger on the line of the railroad company, passed through its gates, apparently without force, under a claim of right apparently asserted in good faith. The railroad in question had the right to make reasonable rules and regulations for the conduct of its business, and if entrance to its station was claimed in contravention to such a rule, it had the right to exclude the person attempting to enter, and if a person entered in violation of such a rule or regulation, obviously, he became a trespasser, and it was the right of the company to eject him, using no more force than was necessary, notwithstanding the fact that the person entering may have done so under reliance upon a claim of right made in good faith. But a trespass, especially when made under a claim of right, is not necessarily of itself a violation of the terms of the ordinance in question, and we are of the opinion, as indicated above, that there is nothing in the record which establishes such a violation. The main reliance of counsel for the City is that the bill of exceptions is imperfect, since it does not include a copy of the ordinance sued upon. The presiding judge, however, in his instructions to the jury stated the substance of so much of the ordinance as was applicable to the case, and to this instruction the

[illegible]

City neither made nor preserved an exception. Moreover, the offense for which the defendant was tried is fully disclosed by the sworn complaint filed in the Municipal Court, and by the statement of counsel for the City, which is preserved in the bill of exceptions, and by which it is bound.

In view of the fact that we are of the opinion that the record does not disclose evidence fairly tending to show a violation of the ordinance in question, the judgment of the Municipal Court is reversed.

REVERSED.

the evidence which was presented in connection with the
affairs for which the defendant was tried is such as to show
that the same defendant killed in the National Guard, and
by the statement of counsel for the State which is presented
in the bill of exceptions, and by which it is shown.

It was at the time of the trial that the

evidence that the second day had disclosed evidence which
tending to show a violation of the provisions in question.
The judgment of the trial court is reversed.

REVEREND.

33 - 21275

HENRY WEISS and SAMUEL S.
SCHWARTZ,
Defendants in Error,

vs.

S. A. CORN,
Plaintiff in Error.

2441
203 I.A. 261

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 24, 1914, Benjamin Siegel and Samuel Schwartz brought suit, in a fourth class case, in the Municipal Court against the plaintiff in error (hereinafter called the defendant) for \$942.85 for goods sold and delivered. Subsequently the names of the plaintiffs were changed to Henry Weiss and Samuel S. Schwartz. The defense asserted was that in May 1914, an oral contract was made between the parties which provided that:

"* * *the defendant agreed to purchase from said firm and said firm agreed to sell and deliver to defendant certain goods, wares and merchandise; that said contract contained a provision that said goods, etc., were to be billed and charged to defendant at certain prices and that defendant was to endeavor to sell and dispose of said goods, etc., from time to time as delivered by said firm and received by defendant, to customers of defendant; that such of said goods, etc., as were accepted and paid for by said customers of defendant were to be paid for by defendant to said firm, and that such of said goods, etc., as were not accepted and paid for by said customers of defendant were to be by defendant returned to said firm, and said firm was to accept or receive back such goods, etc., as defendant was unable to sell and the account of defendant credited accordingly by said firm."

2031.A.261

HENRY WEISS and SAMUEL S. SEHWARTZ, Defendants in Error,

vs.

MINISTERS OF THE

OF CHICAGO.

H. A. COHEN, Plaintiff in Error.

THE JUSTICE TAYLOR delivered the opinion of the

court.

On December 26, 1914, Benjamin Cohen and Samuel

Sehwartz brought suit, in a breach of contract, in the

Municipal Court against the plaintiff in error (hereinafter

called the defendant) for \$22.35 for goods sold and delivered

to. Subsequently the name of the plaintiff was changed

to Henry Weiss and Samuel S. Sehwartz. The defense asserted

was that in May 1914, an oral contract was made between the

parties which provided that:

"**The defendant agreed to purchase from said firm and said firm agreed to sell and deliver to defendant certain goods, wares and merchandise; that said contract contained a provision that said goods, etc., were to be billed and charged to defendant at certain prices and that defendant was to endeavor to sell and dispose of said goods, etc., from time to time as delivered by said firm and received by defendant, to constitute all defendant's list of said goods, etc., as were accepted and paid for by said defendant of defendant was to be paid for by defendant to said firm, and that even of said goods, etc., as were not accepted and paid for by said defendant of defendant were to be by defendant returned to said firm, and said firm was to accept or refuse back such goods, etc., as defendant was unable to sell and was returned to defendant credited accordingly by said firm."

On motion of plaintiffs, the case was placed on the short course calendar; and to avoid the delay that would be caused by taking depositions of witnesses for the defendant, the plaintiffs agreed that certain witnesses would testify according to the contents of certain affidavits, and that the affidavits should be admitted in evidence in place of the personal testimony of the witnesses.

Although the defendant had demanded a jury trial, the latter was then waived and, on February 2, 1915, the case was tried before the court without a jury. The evidence on the part of the plaintiffs consisted of the testimony of Weiss (one of the plaintiffs) and certain exhibits; the evidence on the part of the defendant consisted of the testimony of the defendant, Corn, and the affidavits of Laidhold, Mooney and Glassgold, which latter were received by agreement as the equivalent of their testimony. At the close of the evidence the counsel for the defendant requested certain findings of fact and of law, which the court refused. Upon a motion by the defendant for a finding for the defendant, (the cause being submitted without argument) the following colloquy occurred;

"The Court: I do not see what else I can do but allow the motion. If the only witnesses in this case were the parties themselves it would be hard to decide, but what is the court going to do about these affidavits here? I never saw these affidavits until I read them just now. I am surprised that counsel for the plaintiffs admitted them in evidence, because with these affidavits here it is conceded that there are three witnesses who are alive and who, if they were here, would testify to the things in the affidavits. Is the court not almost bound to believe that testimony? The court did not hear them, and the court cannot observe their demeanor or their conduct, nor put them to any tests as to their reliability and credibility, but I presume they were reasonably well set up business men who would testify in a reasonably orderly way. It

...the fact that the witness was not present at the time of the ...

the following exhibits occurred;

the defendant, (the same being admitted without argument)

refused. Upon a motion by the defendant for a ruling for

weight certain evidence of fact was refused, which the court

advised the witness the counsel for the defendant re-

by agreement as the equivalent of their testimony. At the

testimony, money and clothing, which latter were received

testimony of the defendant, own, and the affidavit of

the witness as the fact of the defendant consisted of the

sum of money (one of the exhibits) and certain exhibits;

hence on the part of the plaintiff a motion of the court-

case was tried before the court within a jury. The evi-

the latter was admitted and, on February 2, 1911, the

Albion New Orleans and Kansas City, Mo.

would really be a completely empty set. It
 thing was actually still set as a subset and was
 their no stability for simplicity, and I presume
 on both counts, and that is my hope as to
 them, and the most correct objective (and I believe
 to believe that) is that the set is not empty
 in the definition. In the other set almost empty
 is the same way, would really be the same
 there are those elements and the same set and
 the same definition as is expected that
 (actually, I believe that is expected, because
 that way. I am not sure how correct or how
 never are those elements (and I think that
 mine is in about that relation about I
 could be hard to believe, but that is the point
 because it this way as the set is empty. I
 can be that the relation. It is the only way
 that I can be that I can be that I can be

seems to me that the only thing in this case is whether or not there was a contract. If there was such a contract - in fact it is a defense - it seems to me that it is not unusual and yet not altogether so - it is not inconceivable that men entered into that kind of a contract in order to get the goods on the market. Is that inconsistent - that such a contract could not be made? Suppose he had agreed to ship his goods here, and he was to pay for what he sold, and return what he did not sell, but if he did sell them he was to receive a certain discount; if he did not sell them there is no question about the discount being considered. I cannot see how the plaintiff can recover. Here is the man himself, the agent - I did not let that go in - what the agent had told him - that is improper, and that ought not to be admitted, but the affidavit is proper. Here is the defendant himself who testifies along similar lines, and then there are the other two witnesses who say that they were there and heard the principal ratify it. There were four witnesses who say that.

Mr. Brown: The principal himself does not say it.

The Court: Yes, he said that he heard him say: 'Yes, you have a contract with me.' Four men here say it. He says: "Made and entered into a certain oral contract with the firm of Weiss, Siegel & Schwartz." The sale is accompanied by certain terms.

Mr. Sutton: Counsel admits that if the witnesses were here they would testify to those facts.

The Court: You are asking me, Mr. Brown, to say that one witness, the plaintiff, is telling the truth, and four witnesses for the defendant are not. If they are telling the truth there is no question here. What right have I to absolutely disregard the testimony of three witnesses without even having the opportunity to observe and make up my mind that they are not telling the court the truth? I must assume they are.

Mr. Brown: Will your Honor just pardon me. I am sorry that your Honor feels that way. I would like to move for a non-suit.

The Court: All right.

Mr. Sutton: I object to that. It has now been submitted to the court for a decision.

The Court: I have not decided it. I argued with counsel about it. I will permit him to take a non-suit, particularly under these circumstances. I do not believe in non-suits myself. I do not know whether they will bring suit ^{or} not, but if he does I do not think he will have any trouble in taking the deposition of witnesses.

Mr. Sutton: The court has been very lenient with counsel in allowing this case to be heard on the short cause calendar when he knew that he could not read the exhibits in that time. We come in here and try the case a whole day, and then submit it to the court for a decision, and under the statute the court has no right to allow a non-suit.

The Court: I think I will permit him to take a non-suit. It was decided altogether on the affidavits.

Mr. Sutton: I desire to preserve an exception."

seems to me that the only thing in this case is whether or not there was a contract. If there was such a contract - in fact it is a defense - it seems to me that it is not unusual and yet not altogether so - it is not inconceivable that an entered into that kind of a contract in order to get the goods on the market. Is that inconsistent - that such a contract could not be made? Suppose he had agreed to ship his goods here, and he was to pay for what he sold, and return what he did not sell, but if he did not then he was to receive a certain discount; if he did not then there is no question about the discount being considered. I cannot see how the plaintiff can recover. Now is the man himself the agent - I did not let that go in - what the agent told him - that is improper, and that could not be admitted, but the plaintiff is proper. Here is the defendant himself who testified about plaintiff's line, and then there are two other witnesses who say that they were there and heard the plaintiff testify. There were four witnesses who say that. Mr. Brown: The plaintiff himself does not say

it. The Court: Yes, he said that he heard him say: 'Yes, you have a contract with me.' Now, you have said it. He says: 'Made and entered into a certain oral contract with the firm of Jones, Smith & Co.' The rule is accompanied by certain facts. Mr. Brown: I would submit that it is the fact that they would testify to the facts. The Court: You are asking me, Mr. Brown, to say that one witness, the plaintiff, is telling the truth, and four witnesses for the defendant are not. If they are telling the truth there is no question here. What right have I to absolutely disregard the testimony of three witnesses without any having the opportunity to observe and make up my mind that they are not telling the court the truth? I must assume they are.

Mr. Brown: Will your Honor hear from me. I am sorry that your Honor feels that way. I would like to move for a non-suit. The Court: All right. Mr. Brown: I object to that. It has been submitted to the court for a decision. The Court: I have not decided it. I agreed with counsel about it. I will permit him to make a non-suit, particularly under these circumstances. I do not believe in non-suits myself. I do not know whether that will bring suit or not, but it is best. I do not think we will have any trouble in that line. Mr. Brown: The court has been very impatient with counsel in allowing this case to be heard on the short notice calendar when he knew that he could not read the exhibits in this time. We now in here and try the case a whole day, and then submit it to the court for a decision, and under the statute the court has no right to allow a non-suit. The Court: I think I will permit him to take a non-suit. It was decided altogether on the affidavits. Mr. Brown: I desire to preserve an exception.

On February 20, 1915, the trial judge allowed the plaintiffs' motion for a non-suit and entered judgment for costs in favor of the defendant. It is to reverse that judgment that this writ of error was sued out and the cause removed to this court.

As to the motion for a non-suit; It is obvious from the language of the trial judge that the plaintiff did not move for a non-suit, until he had been informed by the trial judge that he did not see what he could do but allow the motion of the defendant for a finding in his favor. Before the plaintiff made his motion for a non-suit the trial judge discussed somewhat elaborately the evidence and among other things said, "I do not see how the plaintiff can recover". When the counsel for the plaintiff said, "I am sorry your Honor feels that way. I would like to move for a non-suit", he admitted that he had been informed of the conclusion which the court had reached. Yudelson vs. Winterberg, 185 Ill. App. 454.

As to the merits of the case: Pursuant to section 23 of the Municipal Court Act, it is the duty of this court to decide this case upon its merits as they may appear from the statement or stenographic report which is signed by the trial judge. In the brief of the plaintiffs' (defendants in error) it is stated that they are "desirous to submit to this court the whole case involved"; and, likewise, the brief of the defendant (plaintiff in error) requests that the whole matter may be here determined upon its merits. The evidence in the case is conflicting. The testimony on behalf of the plaintiffs is contradicted by the evidence of the defendant. The trial judge, in his statement at the close of all the evidence, gave a

On February 20, 1912, the trial judge allowed the plaintiff's motion for a non-suit and entered judgment for the defendant. It is to be noted that the judge went that this writ of error was such and the case removed to this court.

As to the motion for a non-suit; it is obvious from the language of the trial judge that the plaintiff did not move for a non-suit, until he had been informed by the trial judge that he did not see what he could do but allow the motion of the defendant for a finding in his favor. Before the plaintiff made his motion for a non-suit the trial judge disclosed some of the evidence and among other things said, "I do not see how the plaintiff can recover." When the counsel for the plaintiff said, "I am sorry your honor feels that way. I would like to move for a non-suit," he admitted that he had been informed of the conclusion which the court had reached. Wintersburg, 183 Ill. App. 464.

As to the merits of the case: Turnward to section 22 of the Kentucky Court Act, it is the duty of this court to decide this case upon the merits as they may appear from the statement or stenographic report which is signed by the trial judge. In the brief of the plaintiff (defendants in error) it is stated that they are "desirous to submit to this court the whole case involved"; and, likewise, the brief of the defendant (plaintiff in error) requests that the whole matter may be here established upon its merits. The evidence in the case is conflicting. The testimony on behalf of the plaintiff is contradicted by the evidence of the defendant. The trial judge, in his statement at the close of all the evidence, gave a

resume and made an analysis of the effect of the evidence, and concluded that the testimony for the defendant was true and established the contract as contended for by him. On the face of the record, we are of the opinion, that the plaintiffs completely failed to make out their alleged case. The plaintiffs have failed, to use the language of the court in Siegmund v. Strackbein, 140 Ill. App. 454, "to comply with the elementary principle of law, which compels the party having the affirmative to maintain and establish it by a preponderance of the evidence."

Inasmuch, therefore, as the granting of the motion for a non-suit was improper and as the evidence fails to prove the claim of the plaintiffs, the judgment is reversed, with a finding in this court in favor of the defendant, (plaintiff in error) and for all his costs.

REVERSED AND JUDGMENT.

...and make an analysis of the effect of the evidence, and concluded that the testimony for the defendant was true and established the contract as contended for by him. On the face of the record, we are of the opinion, that the plaintiff's completely failed to make out its alleged case. The plaintiffs have failed, to use the language of the court in Stearns v. Stearns, 144 Ill. App. 334, "to comply with the elementary principle of law, which compels the party having the affirmative to maintain and establish it by a preponderance of the evidence."

Therefore, the granting of the motion for a non-suit was improper and as the evidence fails to prove the claim of the plaintiffs, the judgment is reversed, with a finding in this court in favor of the defendant, (plaintiff in error) and for all its costs.

REVEREND AND HONORABLE

WILLIAM H. HERHOLD,
Appellant,

vs.

FREDERICK H. HERHOLD and
HERHOLD CHAIR CO., a corp.,
Appellees.

203 I.A. 272

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MESURELY
DELIVERED THE OPINION OF THE COURT.

By his bill (a second amended bill) complainant charged the misappropriation of funds of the Herhold Chair Company by the defendant Frederick H. Herhold, and prayed that he account for same and make restitution and that a receiver of the company be appointed. Answer was filed by defendants, and replication by complainant. Upon hearing, after complainant had introduced his evidence, the court of its own motion ordered the bill dismissed for want of equity. From this order complainant has appealed..

We are of the opinion that the chancellor properly held that the evidence adduced failed to support the allegations of the bill, and that no sufficient ground for the appointment of a receiver was shown.

The defendant Herhold Chair Company manufactured chairs. The business was carried on as a copartnership prior to March, 1907, at which time it was incorporated. The copartnership was known as F. Herhold and Son. The father of the complainant and of the defendant Frederick, who owned the large part of the stock, died in January, 1908, and ten days thereafter his widow died, leaving as heirs the complainant, William, the defendant Frederick, and five other children. The stock of the corporation was divided so that

272. A. I. 802

1. The first of these is the fact that the

• 3

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO

...the fact that the defendant was not present at the time of the shooting.

to one of the following:

...of the bill, and that no legislative branch of the

THE UNIVERSITY OF CHICAGO PRESS

... The work of the association was divided as follows: ... The following products, and five other ... and two days (November 21st and 22nd), leaving at least the ... who owned the large part of the stock, that in January, 1901, ... failure of the completion and of the railroad extension, ... the corporation was known as T. Peterson and Son. The ... price in 1901, at which time it was incorporated. ... Office. The business was carried on as a partnership.

now the complainant holds 310 shares, Frederick and his wife 310 shares, and each of the other children 60 shares, with the exception of Edward who owns 140 shares.

In February, 1909, a division of other property in the estate was attempted. All of the children except the complainant, William, were willing that the children living in the family homestead should have it as their share, and deeds to this end were executed, but William refused to assent to this. This naturally resulted in a feeling of antagonism on the part of the other children towards him, and apparently strong anger on the part of the girls who were living in the homestead. This feeling was expressed towards him by statements indicating that they were six to one against him in the management of the business, and a statement from Frederick, as complainant claims, that William should get nothing out of the business. In June of that year, at the directors' meeting, the complainant was not elected to the position of secretary of the company which he had theretofore held, and his employment as superintendent was also terminated. Frederick
The defendant/^{Frederick} was elected president and treasurer.

In support of the allegations of the bill concerning misappropriation of funds by the defendant Frederick Herhold, only two specific acts were suggested, one with respect to certain transactions of the Herhold Chair Company with Greenfield Manufacturing Company, a lumber corporation, and the other with respect to certain transactions with the Anaconda Gold Mining Company. We do not think it necessary to narrate these transactions in detail. It is not seriously contended that it was proven^{that} in either of these transactions the defendant Frederick Herhold misappropriated funds of the

and the complaint being his name, Frederick and his wife
his share, and each of the other children to receive, etc.
the property of which was not yet divided.

On February 1901, a division of the property
in the estate was attempted. All of the children except the
youngest, William, were willing that the estate should
in the family business should have it as their share, and
heeds to take and were prepared, but William refused to do
and to take. This actually resulted in a failure of the
division as the fact is the only child - William, and
consequently alone, as the fact is the only one left
living in the business. This failing was somewhat serious
and so extensive business was done and in the business
and in the management of the business, and a movement from
Frederick, as explained above, that William should get
nothing out of the business. In fact, at that time, of the
children, William, the youngest, was not placed in the
position of Secretary of the company which he had previously
held, and his management as Secretary was also discontinued.
The following was stated by Frederick and Frederick.

In regard to the situation of the firm and
the representation of the firm by the firm - Frederick
helped, only for a short time was suggested, and the firm
went to certain companies at the same time.
The Frederick's manufacturing company, a limited corporation,
and the other firm was in certain circumstances with the
business and the company. It is not clear if necessarily
to receive these circumstances in detail. It is not necessary
concluded that it was given by the firm - Frederick
and Frederick Frederick (the firm) was the firm of the

company. Indeed, counsel for complainant in his brief concedes that with reference to the Greenfield Manufacturing Company no improper conduct of the defendant was shown. This might also be said of the transaction with the Anaconda Company.

The fundamental basis of complainant's claim is the showing of a hostile disposition towards him on the part of the officers and directors of the Chair Company.

We think it is too well established for further discussion that before the court should appoint a receiver it must clearly appear that such appointment is an imperative necessity to preserve the property of the company. So long as the concern is a prosperous, going concern there is no necessity for a receiver. As is well said in Vienna Bakery Co. v. Heisler, 50 Ill. App. 406, -

"Courts do not appoint receivers as a punishment for past dereliction, nor because of past dangers. Receivers are appointed because of present conditions and well founded apprehensions as to the future."

It might also be added that such apprehensions as to the future must be founded upon facts clearly proven by evidence, and cannot rest merely upon hostile expressions, especially such as naturally arise out of a family quarrel. Complainant has done no more than prove a disposition on the part of the officers of the company antagonistic to him, but no facts showing that as a stockholder he has suffered loss by reason of this antagonism. This antagonism might go so far, as it did, ^{as} to deprive him of a position of employment with the company, but such action was within the powers of the directors representing a majority of the stock, and while this indicates hostility to him personally it is not proof that the business of the corporation will be so handled as to endanger his interests as a stockholder. Among the many cases

supporting the rule that courts will proceed with extreme caution in the appointment of receivers, and will do so only upon a clear showing of necessity for preserving property, are Klein v. Independent Brewing Assn., 231 Ill. 594; People v. Weigley, 155 Ill. 491; First National Bank v. Gage, 79 Ill. 207, and Scofield v. Marinette Saw Mill Co., 153 Ill. App. 469.

Something has been said concerning a denial to complainant of access to the books, but we find no evidence to support this assertion, but rather the evidence shows that since the bill was filed complainant was given, and availed himself of, a full opportunity to examine the books.

Complaint is made of the action of the chancellor in refusing to admit in evidence the opinion of the Appellate Court in a certain other case in which Frederick Herhold was a party. It is said that this opinion would indicate improper conduct on the part of Frederick Herhold in another matter, and that this would tend to show such a habit on his part. This contention is not sound, and the court properly excluded the evidence.

There was no error by the court in its rulings upon the admissibility of evidence, and under the facts before us its judgment that the complainant was not entitled to the relief sought was correct.

The judgment is affirmed.

APPROVED.

suggesting that the fact that the evidence is not only
 contained in the statements of witnesses, but will be so only
 when a jury should be allowed to determine the facts.
 One State v. International Business Arms, 101 Ill. 212; State
v. Bessie, 100 Ill. 451; State v. International Arms v. Bessie, 78
 Ill. 247, and State v. International Arms v. Bessie, 101 Ill.
 212.

Concededly the fact that the evidence is not only
 contained in the statements of witnesses, but will be so only
 when a jury should be allowed to determine the facts, does
 not since the bill has been filed constitute an error, and
 stated himself at a full opportunity to examine the same.
 Concededly it was of the action of the jury to
 determine the fact, in evidence for the purpose of the
 bill is a reversible error in that the evidence is not
 a fact. It is well known that the evidence is not only
 proper evidence on the fact of the evidence is not only
 proper, but that the evidence is not only a fact, but
 a fact. This evidence is not only a fact, but a fact.
 properly reviewed the evidence.

There was no error by the court in the ruling
 when the evidence is not only a fact, but a fact.
 The evidence is not only a fact, but a fact.
 The evidence is not only a fact, but a fact.

Witness.

GEORGE J. WILLIAMS,
Appellant,

vs.

J. C. VREEDER,
Appellee.

203 I.A. 274

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURNLY
DELIVERED THE OPINION OF THE COURT.

This is a suit for unpaid rent of an apartment on a lease at \$37.50 per month, for the month of May and the first half of June, 1914.

One aspect of this case has heretofore been considered in this court. See 195 Ill. App., page 413. We there held that under the terms of the lease the defendant was obligated for rent until April 30, 1915. It appears that the defendant vacated the premises on May 1, 1914, and that plaintiff re-rented the premises after a loss of 1½ months rent, amounting to \$56.25. The defense made upon the second trial, which is the one now under review, was that by mutual agreement of the parties the lease was surrendered and terminated on April 30, 1914. Upon trial it was held that this defense was established, and judgment against the plaintiff was entered.

We hold that this judgment must be reversed for the reason that the defense of surrender by agreement was not proven. At most it was shown that there were negotiations between the defendant and a Mr. Davidson, who undertook to act for the plaintiff. These verbal negotiations went to the extent of drawing a lease of another apartment, which was signed by the defendant and given to Davidson, and

such leases were placed upon the desk of the plaintiff. This was in March, 1914, and it is not denied that at this time defendant was notified by letter that the negotiations for the new lease would not be consummated until the apartment then occupied by the defendant had been rented, and that the defendant would be held answerable for the rent of the apartment until such time as a new tenant would be secured. The evidence shows without denial that the new tenant was not secured until the middle of April; hence, under his contract of lease and the evidence defendant was liable for the rent for the period between May 1, 1914, and the time of the new leasing.

At the conclusion of the hearing of evidence upon the trial below the plaintiff moved the court to direct the jury to return a verdict in favor of the plaintiff and against the defendant in the sum of \$56.25. Under the evidence this motion should have been allowed, and its denial by the trial court was error.

The judgment of the lower court will be reversed, and judgment for this amount, \$56.25, in favor of the plaintiff, appellant here, and against the defendant, appellee here, will be entered in this court.

REVERSED AND JUDGMENT HERE.

such issues were placed upon the part of the plaintiff. This was in March, 1914, and it is not denied that at this time defendant was notified by letter that the responsibility for the new issue would not be commensurate until the question then submitted by the defendant had been tested, and that the defendant would be held responsible for the rest of the argument until such time as a new ground would be created. The evidence shows without doubt that the new tenant was not secured until the middle of April; hence, under the contract of lease and the evidence defendant was liable for the rent for the period between May 1, 1914, and the time of the new testing.

At the conclusion of the reading of evidence upon the trial before the plaintiff gave the court to understand that the jury to return a verdict in favor of the plaintiff and against the defendant in the sum of \$60.00. When the evidence this motion should have been withdrawn, and the trial by the trial court was error. The judgment of the lower court will be reversed, and judgment for said amount, \$60.00, in favor of the plaintiff, appellant here, and against the defendant, appellee here, will be entered in this court.

REVEREND AND HONORABLE JUDGE.

GEORGE E. FORD,
Plaintiff in Error,

vs.

AMERICAN EXPRESS COMPANY and
ILLINOIS CENTRAL RAILROAD CO.,
Defendants in Error.

203 I.A. 275

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for alleged failure on the part of defendants to deliver a shipment of strawberries. On trial by the court a finding was made favorable to the defendants and judgment was entered on the finding.

Plaintiff's action was in contract, of the 4th class in the Municipal Court. By his statement of claim he alleged that he delivered to the defendants as common carriers a carload of strawberries at Independence, Louisiana, for carriage from that point to Chicago; that they received the shipment and promised safely to convey the same; that thereafter the defendants attempted to make delivery to plaintiff, but so carelessly and negligently conducted themselves in that behalf that the consignment became wholly lost to the plaintiff; that defendants while making delivery of the consignment in Chicago negligently moved the car from Chicago to Champaign, Illinois, as a result whereof the plaintiff became damaged.

The evidence tends to show that plaintiff delivered the consignment in question to the American Express Company as a common carrier, at the usual express rates, and the company issued its receipt for the shipment; arrangements for the movement were all with the agent of the express company. No bill of lading was issued by the railroad company, nor is it shown that the railroad

203 L.A. 275

REPORT OF INVESTIGATION

OF THE

GEORGE A. TOWN,
Attorney at Law,

AT

ALABAMA CENTRAL RAILROAD CO.,
Defendants in Error.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT

IN AND FOR THE COUNTY OF ALABAMA.

The finding.
The finding was made favorable to the defendant and judgment was entered on
ment of answer. On trial by the court a finding was
alleged failure on the part of defendant to deliver a ship-
plaintiff's demand was to recover damages for

The finding's action was in contempt of the law
claim in the Circuit Court. By the verdict of claim the
alleged that he delivered to the defendant an amount of
a contract of transportation as transportation, defendant, for con-
time from that point in Alabama; that they received the ship-
ment and received same in conformity with the bill of lading.

The defendant attempted to make delivery to plaintiff, but no
certificates and receipts received themselves in such bills
that the defendant became wholly lost to the plaintiff; that
defendant while making delivery of the goods to the plaintiff
negligently moved the car from Chicago to Birmingham, Alabama.

as a result thereof the plaintiff became damaged.

The witness tends to show that plaintiff delivered

the commodity in question to the defendant and that the
common carrier, at the usual business hours, and the company should
the receipt for the shipment; notwithstanding the fact that the
all with the agent of the express company. It will be seen that
issued by the railroad company, but it is shown that the bill

company had anything to do with the shipment except that the express company used a car which was designated as "I. C. 4591." A delivery was made by the express company in Chicago at the same place where the railroad company also makes deliveries. The car arrived in Chicago on the morning of April 22, 1914, at 8:43, which is conceded to have been a reasonable time for the transportation. It was placed for unloading on the team track of the Illinois Central Railroad Company near Randolph street. The car was then tendered by the express company to an agent for the plaintiff; it was opened and the contents examined by him and found to be in good condition. Plaintiff's agent then signed a receipt for the same, and on the same day the express charges were paid by plaintiff to the express company. Plaintiff allowed the car to remain at that point the entire day of April 22nd, and made no effort to unload it. Next morning the same agent of the plaintiff could not find the car where he had left it the day before. Adopting the language of plaintiff's counsel, it seems "that the car got mixed up with some empties and was hauled to Champaign, Illinois, where the mistake was discovered and it was immediately brought back to Chicago." It does not appear who, if any one, indicated that the car was ready for movement out of Chicago, and it is also conceded that this movement from Chicago to Champaign was no part of the carriage. The car was again placed on the Illinois Central team track upon its return at 1:30 p. m. April 23rd. Plaintiff did not take the berries from the car that day but waited until the following morning, when a portion of the berries were removed; the balance were allowed to remain in the car until April 25th. There was evidence tending to show that by this time they were in a moldy condition.

company had nothing to do with the accident except that the
 express company used a car which was numbered 11, 12, 13.
 A delivery was made by the express company in Chicago
 at the same place where the railroad company also makes del-
 iveries. The car arrived in Chicago on the morning of April
 18, 1912, at 3:45, which is necessary to have been a reasonable
 time for the transportation. It was placed in the yard of the
 the farm track of the Illinois Central Railroad Company near
 Randolph Street. The car was then loaded by the express
 company to be sent for the plaintiff; it was placed on the
 electric tracks by him and found to be in good condition.
 Plaintiff's agent then placed a receipt for the car, and on
 the same day the express charges were paid by plaintiff to the
 express company. Plaintiff allowed the car to remain at least
 until the middle day of April 1912, and made no effort to
 unload it. Next morning the agent of the plaintiff found
 not that the car was there but that it was not there. Plaintiff
 the possession of Plaintiff's company, it seems from the fact
 which by this time was known and was known to Plaintiff. This
 was, about the middle of April 1912, and it was known that
 Plaintiff had no car. It was not known who, if any one,
 indicated that the car was being the movement out of Chicago,
 and it is now understood that this movement was made in
 Chicago on the night of the accident. The car was then
 placed on the Illinois Central farm track near the yard at
 1:30 A. M. April 1912. Plaintiff the next day the car was
 from the fact that it was found near the railroad tracks.
 when a position at the station was reached; the car was
 allowed to remain in the car until April 1912. It was
 evidence failed to show that at this time there was a
 delivery made.

It is a sufficient answer for the railroad company to say that the shipment in question never came into its possession. The facts, as above stated, show that the delivery was to the express company. There can be no recovery for failure to perform a contract to deliver goods if no goods were actually received by the carrier.

It has been held that railroad companies are not common carriers of the traffic of express companies. Memphis & Little Rock R. R. Co. v. Southern Express Co., 117 U. S. 1. This case holds that railroads, in the furnishing of facilities to express companies for the transportation of their traffic, are not common carriers but act only as private agents under such agreements as they may make with the express companies; that with reference to carrying express shipments the duty owed to the public is by the express companies as common carriers and not by the railroads.

The defense of the express company is entirely sound. The evidence clearly shows a delivery of the consignment to the plaintiff. The mishap of having the car removed was through no fault of the express company; its contractual relations with plaintiff were at an end upon the delivery to plaintiff of the consignment and the payment of express charges. The goods were delivered to plaintiff within a reasonable time, examined by him and found to be in good condition. His failure promptly to unload the car not only made possible the accident of having it moved as an empty car, but also contributed to the deterioration of the shipment itself.

The judgment of the trial court was right and is affirmed.

AFFIRMED.

HEINRICH WALDES, SIEGMUND WALDES,
IGNATIUS and EDWARD MESZINGER,
a co-partnership, trading as
Waldes & Company,

Appellants,

vs.

W. R. HANES,

Appellee.

203 I.A. 276

Appeal from

County Court,

Cook County.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover for a large number of buttons or fasteners sold by them to defendant, who replied that he had bought them under a warranty of fitness for a special purpose but they afterwards proved unfit, imposing loss upon him for which he claimed damages as a set-off. Upon trial by a jury defendant had a verdict against the plaintiffs on his set-off for \$275 upon which judgment was entered, from which plaintiffs have appealed.

It is established by virtually undisputed evidence that defendant, a merchant tailor, was intending to manufacture and place on the market a garment called a pants protector, something like overalls, with the legs on the inner side fastened with buttons or fasteners like the ordinary glove fastener, consisting of a metal cap fitting over a metal post; that a Mr. Leber, an agent of plaintiffs, knew of this and approached the defendant with a view to selling him the fasteners; that defendant told the agent that the garment was to be used by persons while cleaning or working with automobiles, which would soil it and make it necessary that the garment should be laundered,

208 I.A. 276

Admitted from
County Court,
County of Cook,
Illinois.

WILLIAM W. WILSON, Plaintiff,
vs.
J. R. WILSON, Defendant.

MR. JUSTICE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for a large number of Wilson or Eastman sold by him to defendant who replied that he had bought them under a warranty of fitness for a special purpose but they were not proved unfit, imposing loss upon him for which he claimed damages as a set-off. On trial by a jury defendant had a verdict of \$1000.00 on his set-off for 1917 and 1918. Judgment was entered, from which plaintiff has appealed.

It is established by plaintiff's undisputed evidence that defendant, a merchant sailor, was intending to carry on his business as a merchant sailor and to give protection, and that like vessels, with the like on the lower side (and the like on the upper side) the plaintiff's vessel, consisting of a metal cap fitting over a metal body; that a Mr. Wilson, an agent of plaintiff, knew of this and recommended the defendant with a view to selling him the vessel; and that while the agent that the defendant was to be used by plaintiff while cleaning or working with automobiles, which would sell it and make it necessary that the defendant should be furnished,

and that therefore the fasteners must be of such a kind as would stand up in the process of going through a laundry. It is clear that the parties understood this to have reference to the possibility of the caps, and especially the metal posts, being flattened or pressed out of shape by the laundry mangle and roller through which the garments would pass in the process of laundering. Any other meaning to the expression "stand up in the laundry" would be senseless. The agent was not certain as to the fitness of the fasteners for such purpose, and told the defendant that he would submit this to his principals. He reported to the general manager of plaintiffs, and subsequently informed the defendant that the general manager had said that the fasteners would "stand up" in the laundry as desired by the defendant. Although the agent showed defendant a card containing sample fasteners, yet the kind of fastener desired and ordered by defendant was of a special kind and not like any one of the samples, and was to be made with reference to his special needs and purposes in connection with the garments to which they were to be attached. These fasteners were made up in accordance with the order and attached to the garments which defendant sold to customers. Soon thereafter he commenced to receive complaints that the fasteners would not stand up when laundered but that the posts would be flattened or mashed. The proof that they failed to meet the warranty as to stability when laundered is ample and unquestionable.

These facts establish a simple case of an express warranty that an article to be manufactured for a particular and special use would be fit for that use; it is an undertaking by the seller collateral to the contract of sale. Sales of instruments and machinery by manufacturers are

and that therefore the witnesses must be of such a kind
as would stand up in the process of going through a laundry.
It is clear that the witnesses were not to have a chance
to the possibility of an error, and especially in the
case, being a witness or person out of shape by the laundry
wangle and roller through which the garments would pass in
the process of laundering. Any other meaning to the
expression "stand up" in a laundry would be meaningless. The
agent was not certain as to the fitness of the witnesses for
such purpose, and told the defendant that he would mention
this to his principals. He reported to the General Manager
of principal, and subsequently informed the defendant that
the General Manager had said that the witnesses were "in
up" in the laundry as required by the defendant. Although
the agent showed defendant a card containing names of persons,
and the kind of laundry required and the kind of work to be
of a special kind and not like any one of the others, and was
to be made with reference to the special kind and purpose
in connection with the garments to which they were to be
attached. These witnesses were made up in accordance with
the order and attached to the garments which defendant said
to customer. Some alteration of customer to receive com-
plaints that the witnesses would not stand up when laundered
but that the goods would be finished as wanted. The proof
case they failed to meet the difficulty in the laundry when
laundered in single and double wash.
These facts establish a single case of an express
warranty that an article to be laundered was a particular
and special was made to fit for that use. It is an im-
taking by the seller collateral to the contract of sale.
Sales of instruments and machinery by which various the

generally accompanied by a warranty of fitness for the purposes for which they are intended - and this transaction is of that class. It follows, therefore, that upon the failure of the warranty defendant was entitled to recover damages, if any, upon his claim of set-off.

We are in accord with most of the criticisms directed by counsel for plaintiffs against the instructions given to the jury; they do not correctly state the law and are calculated to confuse and mislead. In a close case on the facts they would be sufficiently prejudicial to compel a reversal, but under the undisputed evidence in this case the jury returned the only verdict it could properly return. We shall therefore not reverse on account of the erroneous instructions.

No instruction as to measure of damages was given, but this cannot be complained of as the court was not requested by either of the parties to give such an instruction. We think, however, that there was sufficient evidence to warrant the jury in finding that defendant incurred damages for even a larger amount than was fixed by the verdict. The difference between what the defendant was obliged to pay for fasteners that answered the purpose, and the price agreed upon to be paid to plaintiffs was something over \$900. This would have been an element of damage proper for recovery, as the law is that the defendant was entitled to the benefit of his bargain. 2 Mechem on Sales, sec. 1817. Another element of damage shown by the evidence was that defendant by the use of the unfit fasteners made worthless a considerable number of the pants protectors left in his shop, with resulting damage of something over \$500. Other elements are the payment by defendant of freight and duty upon the fasteners. We do not think plaintiffs can complain, as

remotely connected by a variety of lines for the
purpose for which they are intended - and this transaction
is of that class. It follows, therefore, that upon the
failure of the warranty defendant was entitled to recover
damages, if any, upon his claim of cost.

There is record with respect to the witnesses direct-
ed by counsel for plaintiff's witness and the witness given
to the jury; they do not positively state the law and are
calculated to confuse and mislead. It is clear from the
facts that they would be insufficiently prejudicial to compel a
reversal, but under the admitted evidence in this case the
jury returned the verdict is said to be clearly correct.
We will therefore not reverse on account of the erroneous
instructions.

In instruction no. 10 a measure of damages was given,
but this cannot be complained of as the court was not re-
quested by either of the parties to give such an instruction.
We think, however, that it is not sufficient evidence to
warrant the jury in finding that defendant should be given
for even a larger amount than was fixed by the verdict. The
difference between what the plaintiff was entitled to pay for
damages and what he received, and the price agreed
upon to be paid to plaintiff for damages was \$100. This
would have been an element of damage agreed for recovery,
as the law is that the plaintiff was entitled to the benefit
of his bargain. Another element, I think, was the cost of
damages shown by the evidence and the benefit by the
use of a small quantity of goods, which was
number of the same property lost in this case, with
resulting elements of damages over \$500. Other elements
are the payment of defendant of freight and duty upon the
freighters. We do not think plaintiff can complain, as

the verdict of \$275 is considerably less than might have been awarded under the evidence.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

the article of 1927 is considerably less than that have
been exhibited under the statute.
for the reasons above indicated the judgment
is affirmed.

ATTEST.

CITY OF CHICAGO,
Defendant in Error,

vs.

EMMA SIMONETTI,
Plaintiff in Error.

203 T.A. 279

ERROR TO MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant was arrested and charged with keeping and maintaining a disorderly house in violation of an ordinance of the City of Chicago. Upon trial she was found guilty by a jury and fined \$100. By this writ of error it is sought to have this judgment reversed.

It is first asserted that the trial judge improperly refused a petition for change of venue. It appears from the record that the defendant was arrested by warrant on March 24, 1915, and on the same day moved the court for postponement of the trial. The case was called for trial on April 19th and continued until April 20th, on which date the trial was postponed to April 21st. On the latter date, the parties appearing in court, the defendant moved for a change of venue, which motion was overruled. Afterwards the cause came on for trial and a portion of the evidence was heard by the jury; further hearing was postponed until April 22nd, when the defendant moved the court to quash the complaint, which was overruled; the parties then went to trial which was continued until verdict was rendered.

As to the ruling of the court upon petition for change of venue plaintiff says that the action of the court is not properly preserved for our review. Section 23 of the Municipal Court Act, with reference to cases of this kind provides that parties desiring to preserve matters of this

2081A 279

SECTION OF JUDICIAL DEPT

OF CHICAGO.

CITY OF CHICAGO,
Incorporated in 1837.

vs.

JOHN WILSON,
Plaintiff in Error.

IN THE CIRCUIT COURT OF THE CITY OF CHICAGO,
IN AND FOR THE COUNTY OF COOK.

Defendant was arrested and charged with keeping and maintaining a disorderly house in violation of an ordinance of the City of Chicago. Upon trial and was found guilty by a jury and fined \$100. By this trial of error it is sought to have this judgment reversed.

It is first asserted that the trial judge improperly refused a petition for change of venue. It appears from the record that the defendant was arrested by warrant on March 24, 1915, and on the same day moved the court for postponement of the trial. The case was called for trial on April 19th and continued until April 20th, on which date the trial was postponed to April 21st. On the latter date, the parties appearing in court, the defendant moved for a change of venue, which motion was overruled. Afterward the case came on for trial and a portion of the evidence was heard by the jury; further hearing was postponed until April 22nd, when the defendant moved the court to quash the indictment, which was overruled; the parties then went to trial which was continued until further adjournment.

As to the ruling of the court upon petition for change of venue defendant says that the action of the court is not properly presented for our review. Section 21 of the Municipal Code Act, with reference to venue of such cases provides that parties desiring to remove evidence of such

sort for review shall do so by making "a correct statement of such other proceedings in the case as such party may desire to have reviewed." We think this is sound. The statute has not been followed. What is said to be a bill of exceptions was presented to the court and signed by it, but we find nothing in section 23, supra, providing for a bill of exceptions in such a matter as this.

Furthermore, the case was pending before the same trial judge from March 23rd until April 21st, when the motion for change of venue was made; upon its refusal defendant went to trial and her attorney examined jurors and witnesses and in every way participated in the trial. It has been held in Moyses v. Kern, 94 Ill. 521, under similar circumstances, that "It would be vicious practice to permit a party, under such circumstances, to proceed to trial, try the experiment whether he could succeed, and if he failed, then to fall back on the refusal to grant a change of venue, and claim a reversal." And in Engebald v. C. M. & St. P. Ry. Co., 75 Ill. App. 208, this court held, under the authority of the Moyses case, that this participation in the trial was a waiver of any alleged error of the trial judge in previously overruling the application for a change of venue.

It might also be said that the affidavit for change of venue was sworn to before the attorney in the case. It has been frequently held that such affidavits will not be received or considered. Taylor v. Hatch, 12 Johns. 340; Willard v. Judd, 15 Johns. 531; Hallenback v. Whitaker, 17 Johns. 2; Vary v. Godfrey, 6 Cow. 587; Den v. Geiger, 9 F. J. Law (4 Halstead). 225; Ropkinson v. Luckley, 8 Taunt. 74. "By the general practice of all the courts affidavits sworn before the attorney or solicitor in the cause cannot be read." Tidd's Practice, 494; Den. Chy. Prac. 234.

We must assume the sufficiency of the evidence to support the charges made, for the reason that there has not been preserved for our review the ordinance which defendant is charged with having violated. We have repeatedly held that in the absence of the ordinance, of which we cannot take judicial notice, we must presume the correctness of the finding of the trial court. City v. Tearney, 187 Ill. App. 441; City v. Baker, 157 id. 130; City v. Moran, 192 id. 57; City v. Kohn, 195 id. 399.

Something is said about two cases against the defendant having been tried by the same jury at the same time and that the jury were sworn only once, and that the defendant was allowed only five peremptory challenges. This statement is not supported by the record, from which it appears that only one case was tried by the jury. We are bound by the record.

There being no convincing reason for disturbing the judgment it is affirmed.

AFFIRMED.

we must assume the sufficiency of the evidence
to support the charges made, for the reason that there has
not been presented for our review the evidence which de-
fendant is charged with having violated. We have repeatedly
said that in the absence of the evidence, of which we cannot
take judicial notice, we must presume the correctness of the
findings of the trial court. City v. Terrell, 127 Ill. App.
441; City v. Hume, 127 Ill. App. 120; City v. Ryan, 127 Ill. App.
127; City v. Ryan, 127 Ill. App. 127.

Nothing is said about two cases against the
defendant having been tried by the same jury at the same
time and that the jury were sworn only once, and that the
defendant was allowed only five peremptory challenges. This
statement is not supported by the record, from which it ap-
pears that only one case was tried by the jury. We are
bound by the record.

There being no convincing reason for stating
the judgment is affirmed.
Affirmed.

174 - 22601

CITY OF CHICAGO,
Defendant in Error,
vs.
GUSSIE BOLLER,
Plaintiff in Error.

203 I.A. 281

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant was arrested and charged with keeping a place in Chicago where liquor was sold in less quantities than one gallon, without a license, in violation of an ordinance of the City of Chicago, and upon trial by a jury she was found guilty and fined \$50.

The defendant, by the same counsel appearing in case No. 22600, in which an opinion is this day filed, asserts error by the trial judge in denying a petition for change of venue, and makes substantially the same points upon the record as were made in that case. What we said in the opinion in No. 22600 with reference to the ruling on the application for change of venue is applicable to the instant case. The matter is not properly preserved for our review by a correct statement as prescribed by the statute, and the affidavit was sworn to before the attorney in the cause.

Neither is the ordinance before us for review, and in its absence we will assume the sufficiency of the evidence. See cases cited in No. 22600, supra.

2031.A.281

CHARGE TO MURDER IN CHARGE
OF CHARGE.

CITY OF CHARGE,
Defendant in Error,
vs.
CHARGE OF CHARGE,
Plaintiff in Error.

MR. PRESIDING JUSTICE HONORABLE
DELIVERED THE OPINION OF THE COURT.

Defendant was arrested and charged with keep-
ing a place in Chicago where liquor was sold in less quanti-
ties than one gallon, without a license, in violation of an
ordinance of the City of Chicago, and was fined \$50.
The defendant, by the state counsel appearing in

case No. 28000, in which an opinion is this day filed, as-
serts error by the trial judge in denying a petition for
change of venue, and states substantially the same facts
upon the record as were made in that case. And we said in
the opinion in No. 28000 with reference to the ruling on
the application for change of venue is applicable to the
instant case. The matter is not properly preserved for
any review by a correct statement as required by the
statute, and the affidavit was sworn to before the attorney
in the case.

Neither is the ordinance before us for review,
and in its absence we will assume the sufficiency of the
evidence. See cases cited in No. 28000, supra.

In this case, also, the statutory record does not disclose that two cases against the defendant were tried at the same time.

The judgment is affirmed.

AFFIRMED.

in this case, since the statutory remedy does
not disclose that the owner against the defendant was paid
at the same time.
The judgment is affirmed.

REVEREND

175 - 22602

CITY OF CHICAGO,
Defendant in Error,

vs.

GUSSIE BOLLER,
Plaintiff in Error.

203 I.A. 282

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant was charged with having kept and maintained a house of ill-fame for the practice of prostitution, in violation of a city ordinance. Upon trial by a jury she was found guilty and fined \$75. She asks that this judgment be reversed, contending that the evidence did not prove the charges.

Plaintiff makes the point that the "correct stenographic report" incorporated in the record should be stricken therefrom for the reason that the time within which it should have been filed as allowed by statute had expired before it was filed. Upon inspection we find this to be true. The statute - section 23 of the Municipal Court Act - provides that a correct stenographic report shall be signed and placed on file at any time within 30 days after the entry of judgment, or within such further time as may "upon application therefor within said 30 days, be allowed by the court." The instant judgment was rendered October 23, 1915; the last day for filing the stenographic report or for applying for further time fell on November 22nd. The record shows that the application for an extension was

1903 I.A. 282

IN THE
MUNICIPAL COURT
OF CHICAGO

CITY OF CHICAGO,
Defendant in Error,

vs.

GUSSIE HOLMES,
Plaintiff in Error.

MR. HOLDING IN THE
DIVISION OF THE COURT.

Defendant was charged with having kept and main-
tained a house of ill-fame for the purpose of prostitution,
in violation of a city ordinance. Upon trial by a jury she
was found guilty and fined \$50. She asks that this judgment
be reversed, contending that the evidence did not prove
the charges.

Plaintiff makes the point that the "correct stereo-
graphic report" incorporated in the record should be stamped
therefrom for the reason that the time within which it
should have been filed was allowed by statute but expired
before it was filed. Upon inspection we find this to be
true. The statute - section 23 of the Municipal Court
Act - provides that a correct stenographic report shall be
served and placed on file at any time within 30 days after
the entry of judgment, or within such further time as may
"upon application therefor within said 30 days, be allowed
by the court." The latest judgment was rendered October
23, 1912; the last day for filing the stenographic report
or for applying for further time fell on November 1st.
The record shows that the application for an extension was

made on November 24th, 32 days after the rendition of the judgment, and hence too late. The court did not then have jurisdiction to allow further time.

The stenographic report being stricken, we cannot consider any assignments of error based upon the sufficiency of evidence. No errors arising from the statutory record are presented to us. It follows, therefore, that the judgment should be affirmed.

AFFIRMED.

[illegible]

• 1970-1971

JOHN and WILLIAM HALLISSEY,
as Hallissey Brothers,
Appellees,

vs.

ROTHSCHILD & COMPANY,
Appellant.

203 I.A. 283

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$225 had by plaintiffs in their suit against the defendant to recover damages to plaintiffs' horse occasioned by the negligent operation of defendant's automobile.

The case was tried by a jury. It was called for trial at a time when the defendant's attorney was engaged elsewhere in the trial of a case. His clerk asked that it be continued, which request was refused. The trial court took occasion at this time to make an address to the jury which it may be conceded was uncalled for and improper. We are asked to hold that these remarks were so prejudicial as to necessitate a reversal. We are not inclined to agree with this contention. They were made by the court in answer to statements by the clerk of defendant's attorney, and as explanatory of the court's action in denying the request for a continuance. We think, further, in view of the fact that the verdict under the evidence is the only one the jury properly could have reached, that the judgment should not be reversed even if the remarks of the court might be construed to be prejudicial. See Collison, Admr., v. I. C. R. R. Co., 146 Ill. App. 64.

From the evidence the jury could properly find that the driver of plaintiffs' horse was driving east on Madison street in Chicago; that when he was about to turn south in Homan avenue, a cross street, he looked behind and saw an automobile coming a quarter of a block away; that the automobile was being driven at a rate of from 18 to 20 miles an hour, and that it attempted to pass the horse drawn vehicle on its south side, that is, to the right, just as the horses were turning into Homan avenue; that it struck the horse's front feet, and went 200 feet before it could be stopped.

Under such circumstances it was properly a question of fact for the jury to determine whether or not the accident was caused by the sole negligence of the defendant; and we are unable after consideration to say that its conclusion was not warranted upon the evidence.

It is also contended that the damages are excessive. There was evidence tending to show that before the accident the reasonable market value of the horse was \$250, and that by reason of the injury it became lame and unfit for work, and that its value at the time of the trial was about \$50; that it could be used on a farm but could not be used again on the streets. The amount paid for the board of the horse following the injury was \$46. This would justify a verdict of \$225, without any testimony as to the cost of hiring another horse to take the place of the injured animal. We do not see how under the evidence the defendant could avoid being held liable for damages occasioned by the accident.

The judgment is affirmed.

AFFIRMED.

From the evidence the jury could properly find

that the driver of plaintiff's horse was driving east on
Union street in 1913; that when he was about to turn
west in Union street, a horse team, as located behind the
team in plaintiff's stable, a driver of a black team; that the
automobile was being driven at a rate of from 15 to 20 miles
an hour, and that it attempted to pass the horse team vehicle
on its south side, that is, to the right, just as the horses
were turning into Union street; that it struck the horse's
front feet, and went 200 feet before it could be stopped.

Under such circumstances it was properly a
question of fact for the jury to determine whether or not the
accident was caused by the sole negligence of the defendant;
and we are unable after consideration to say that the con-
clusion was not warranted upon the evidence.

It is also contended that the damages are ex-
cessive. There was evidence tending to show that before the
accident the reasonable market value of the horse was \$100,
and that by reason of the injury it became lame and unfit
for work, and that its value at the time of the trial was
about \$25; that it could be used as a team but could not be
used again on the streets. The amount paid for the horse of
the horse following the injury was \$10. This would justify
a verdict of \$75, without any testimony as to the cost of
fixing another horse to take the place of the injured animal.
We do not see how under the evidence the defendant could
be held liable for damages exceeding \$75.

The judgment is affirmed.

ATTESTED.

203 - 22631

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ABE SHAPIRO and JAKE LA BOM,
Plaintiffs in Error.

203 I.A. 292

ERROR TO CRIMINAL COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendants, charged with conspiracy, were tried before a jury which returned a verdict finding them guilty. They have brought the record to this court for review.

From the abstract of record filed on their behalf it does not appear that any judgment was entered by the trial court. The abstract is the pleading of the parties in this court, and must be construed against them.

As it does not appear that there has been a final judgment in this case there is nothing for this court to review. Hence the writ of error must be dismissed, which is accordingly ordered.

WRIT OF ERROR DISMISSED.

203 I.A. 203

WAS TO CHARGE COURT,
DOCK COURT.

RECORD OF THE STATE OF ILLINOIS,
Defendant in Error,
vs.
THE STATE AND JOHN A. BART,
Plaintiffs in Error.

MR. JUSTICE JESSE McHENRY

DELIVERED THE VERDICT OF THE COURT.

Defendants, charged with conspiracy, were tried
before a jury which returned a verdict finding them guilty.
They have brought the record to this court for review.
From the abstract of record filed on their be-
half it does not appear that any judgment was entered by
the trial court. The abstract is the finding of the jury
in this case, and must be considered as such.
As it does not appear that there has been a
final judgment in this case there is nothing for this court
to review. Hence the writ of error must be dismissed, which
is accordingly ordered.

THIS IS HOW IT STANDS.

ANNA PICO, a minor, by NICALO
ACCOMARDO, next friend,
Plaintiff in Error.

vs.

CHICAGO RAILWAYS COMPANY,
Defendant in Error.

203 I.A. 293

ERROR TO CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MCHURLEY
DELIVERED THE OPINION OF THE COURT.

In this case plaintiff sought to recover damages for personal injuries inflicted upon her by a street car belonging to the defendant. Upon trial by jury a verdict was returned, upon which we are informed by the abstract filed by the plaintiff in this court judgment was entered, but the abstract fails to tell us the nature of the verdict or what the judgment was. In many cases under such circumstances we have affirmed the judgment on the ground that the abstract is the pleading of the parties in this court and we cannot pass upon a verdict and judgment which an appellant or plaintiff in error fails properly to present to us. It has also been frequently held that an index to the record is not an abstract of the record.

We have, however, from the nature of this case been led to give consideration to the merits involved. The case of the plaintiff has been presented to us upon the theory that the verdict and judgment were adverse to her claim. We are of the opinion that upon the merits this judgment of nil capiat should be affirmed.

The plaintiff in her declaration had charged the negligent operation of defendant's street car in that it was being driven at a dangerous and high rate of speed; that no

gong was rung, and that the pavement in the street next to the tracks, which it is alleged it was the duty of defendant to keep in repair, was left irregular and uneven, so that plaintiff stumbled upon the pavement and fell with her hand upon the track.

From the evidence the jury could properly find that on the day of the accident Anna Pico, called plaintiff, about five years of age, with other children was going eastward in Locust street in Chicago towards Clark street, which runs north and south, their destination being Washington Square, which is located on the east side of Clark street; that the motorman of the southbound car saw the plaintiff standing at the west curb of Clark street at Locust street; that his car at this time was approaching the crossing at a speed of 10 or 12 miles an hour; that at this time plaintiff made no attempt to cross the street; that when he was within a short distance of plaintiff she suddenly ran from the curb and fell full length in the street alongside of the door at the front end of the car, with her right hand on the rail just in front of the wheels, which ran over the hand, severely injuring it; that as soon as the motorman saw the child leave the curb he put on his brakes and did all he could do to bring the car to a stop; that when he saw her leave the curb he struck his gong and applied the brakes; that when she got within four or five feet of the track she stumbled and fell.

It has been repeatedly held under similar circumstances that the motorman could not be charged with negligence, a very recent case being Trafelat v. Chicago City Ry. Co., Appellate Court No. 22392, opinion filed November 27, 1916.

There is no evidence to support the allegation

of negligence on the part of defendant with reference to the street paving; furthermore, it appears that a photograph of the street pavement at this point was introduced in evidence and considered by the jury, but such photograph has not been incorporated in the bill of exceptions. We must therefore assume the sufficiency of the evidence to justify the jury in finding adversely to plaintiff's claim in respect to the pavement.

Plaintiff's counsel devote a considerable portion of their brief to criticism of instructions given by the court at the request of the defendant and of the refusal of the court to give instructions requested by the plaintiff, but we are not inclined to hold that errors, if any, in this respect are of sufficient importance to warrant a reversal.

Complaint is made of the alleged conduct of one of the jurors. The impropriety with which he was charged was denied unequivocally by him under oath. The matter was first brought to the attention of the court by a verbal statement of one of the attorneys for the plaintiff, and based upon that a request was made that a juror be withdrawn and the case continued. It was not error under such circumstances to deny this motion, and upon examination of affidavits by the parties concerned the court was fully justified in concluding that no such improper conduct as was claimed had taken place.

It occurs to us that this is a proper case to suggest to counsel for the plaintiff in error that a brief following more closely the rules of this court concerning the composition of briefs would be more helpful to the court.

Upon the whole record we see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

of negligence on the part of defendant with reference to the
street lighting; furthermore, it appears that a photograph of
the street pavement at this point was introduced in evidence
and considered by the jury, but such photograph has not been
introduced in the bill of exceptions. We must therefore
assume the sufficiency of the evidence to justify the jury
in finding adversely a plaintiff's claim in respect to the
Government.

Plaintiff's counsel have a considerable portion
of their brief to criticism of instructions given by the
court at the request of the defendant and of the refusal of
the court to give instructions requested by the plaintiff,
but we are not inclined to hold that errors, if any, in this
respect are of sufficient importance to warrant a reversal.
Complaint is made of the alleged conduct of one
of the jurors, the impropriety with which he was charged was
based unequivocally by his under oath. The matter was first
brought to the attention of the court by a verbal statement
of one of the attorneys for the plaintiff, and based upon that
a request was made that a juror be withdrawn and the court dis-
missed. It was not error to grant such a request to any
this action, and upon examination of affidavits by the parties
concerned the court was fully justified in concluding that no
such improper conduct as was claimed had taken place.
It appears to us that this is a typical case to
submit to counsel for the plaintiff in order that a bill
following more closely the rules of this court concerning
the composition of panels would be more useful to the court.
Upon the whole record we are so inclined to affirm
the judgment, and it is affirmed.

ATTORNEYS.

MARY R. BEAMESDERFER,
Defendant in Error,

vs.

ANTON J. CERMAK, Bailiff of the
Municipal Court of Chicago,
Plaintiff in Error.

203 I.A. 294

ERROR TO COUNTY COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MESURELY
DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant seeks to have reversed a judgment rendered against him by the County Court in an action of replevin.

Prior to March 17, 1915, the defendant, who is Bailiff of the Municipal Court of Chicago, made a levy under an execution issued on a judgment theretofore rendered by the Municipal Court, upon personal property described in the replevin writ thereafter issued. On March 17th the plaintiff, Mary R. Beamesderfer, filed in the office of the Clerk of the County Court an affidavit for replevin, alleging that she was the owner and entitled to the possession of the personal property levied on by the defendant as aforesaid. The writ was thereupon issued, directed to the Sheriff of Cook County, who on the same date replevied the property and delivered the same to the plaintiff and served the writ of replevin upon the defendant.

The replevin writ was made returnable to the next term of court, that is, the April term, the first day of this term of the County Court being April 12, 1915. Defendant entered his appearance in said cause on March 30, 1915. Plaintiff's declaration was filed on May 13, 1915. The first day of the May term of the County Court fell on

2031.A.294

BOOK TO COUNTY COURT

BOOK COUNTY

STATE OF ILLINOIS
In the County of Cook

vs.

ALVIN J. GIBSON, Plaintiff of Law,
Municipal Court of Chicago,
- Plaintiff in Error.

IN REPLYING TO THE VERDICT

BEFORE THE COURT OF THE COUNTY

By this writ of error the defendant seeks to

have restored a judgment rendered against him by the

County Court in the action of trespass.

Prior to March 17, 1913, the defendant, who is

Deputy of the Municipal Court of Chicago, made a levy under

an execution issued on a judgment rendered against him

the Municipal Court, upon personal property belonging to the

plaintiff and thereafter removed it to the office of the

Deputy, who is also the plaintiff in the action, alleging that

the County Court in the action of trespass, although the

defendant was not a party to the action, and that the

County Court rendered its judgment in violation of the

will and intention of the defendant, and that the

County Court, and on the same date rendered its judgment and the

defendant the same to the plaintiff and removed the same to the

plaintiff and the defendant.

The plaintiff still has some property in the

name of the County Court, and the plaintiff, the first day

of this term of the County Court being April 1, 1913, the

defendant entered his appearance in said cause on March 11,

1913. The plaintiff's declaration was filed on May 15, 1913.

The first day of the term of the County Court being

May 10th. Defendant did not plead to the declaration. The cause was called for trial on February 28, 1916, and the defendant, not appearing, was defaulted and judgment entered against him.

This must be reversed for the reason that the cause was not at issue and should not have been called for trial; neither was defendant in default on February 28th, for the reason that the declaration of plaintiff should have been filed ten days prior to the April term of the County Court. Section 32 of the Practice Act provides that the declaration shall be filed ten days before the term of court to which the summons is returnable, and that if it is not so filed ten days before the second term of the court the defendant shall be entitled to a judgment as in the case of non-suit. That fits the situation before us. Plaintiff's declaration was not filed until after the beginning of the second term to which the writ was made returnable.

The judgment is reversed and the cause is remanded with directions to dismiss the replevin suit at plaintiff's costs.

REVERSED AND REMANDED
WITH DIRECTIONS.

May 1901. Defendant did not plead to the indictment. The
court was called for trial on February 20, 1901, and the de-
fendant, not appearing, was defaulted and judgment entered
against him.

It must be reversed for the reason that the
error was not of law and would not have been called for
trial; neither was defendant in default on February 20th.
For the reason that the application of plaintiff should
have been filed ten days prior to the April term of the
county court. Section 34 of the practice act provides
that the application shall be filed ten days before the
term of court to which the answer is returned, and
that it is to not be filed ten days before the second term
of the court the defendant shall be entitled to a judgment
as in the case of non-suit. Thus the application before
me. Plaintiff's application was not filed until after the
beginning of the second term to which the writ was made re-
turnable.

The judgment is reversed and the case is re-
manded with directions to dismiss the petition with
plaintiff's costs.

WILLIAM L. HARRIS,
Clerk of Court.

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,
vs.
JAMES Y. THOMPSON,
Plaintiff in Error.

203 I.A. 296

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant was proceeded against by information that he did unlawfully, wrongfully and unjustly, for his own gain and to prevent the owner again possessing his property, buy, receive and aid in concealing fourteen bags of Lehigh cement to the value of \$7.13, the property of Gustaf A. Johnson, knowing that the cement had been stolen.

Many errors are assigned, but in the conclusion at which we have arrived there must be a new trial, and we shall therefore not discuss the evidence or its probative force.

Trial by jury was waived and the trial Judge, after hearing the testimony, found defendant guilty of the crime charged in the information in manner and form as therein charged, and sentenced the defendant to pay a fine of \$300 and \$6 taxed as costs and to stand committed to jail until fine and costs were paid, etc.

It is assigned for error that the court failed to find the value of the property charged to have been unlawfully received by defendant, and also permitted the state's attorney to amend the information by striking out the name of James H. McQueeny and inserting that of defendant.

2031.A.236

CHARGE TO JUDICIAL OFFICE
OF CHICAGO.

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,
vs.
JAMES M. HENNESSY,
Plaintiff in Error.

BY JUSTICE HENNESSY DELIVERED THE VERDICT OF THE COURT.

Defendant was proceeded against by information that he did unlawfully, feloniously and unlawfully, for his own gain and to deprive the owner of his property, his property, by, relative and in consideration of fourteen years of which cannot be the value of \$7.12. The property of Charles A. Johnson, knowing that the owner had been stolen.

That errors are assigned, but in the commission of which we have advised there was no new trial, and we shall therefore not discuss the evidence of the prospective force.

Trial by jury was waived and the trial taken, after hearing the testimony, found defendant guilty of the crime charged in the information in manner and form as therein charged, and sentenced the defendant to pay a fine of \$500 and to be locked in prison and to stand committed to jail until fine and costs were paid, etc.

It is assigned for error that the court failed to find the value of the property charged to have been unlawfully received by defendant, and also that the state's attorney to move the information of which was the name of James M. Hennessy was inserted that it should not.

Unlike an indictment, an information may be amended, and the amendment in this case was made necessary owing to a clerical error on the part of the person who transcribed the information. It was held in Long v. People, 135 Ill.435, that in matters of amendment an information stands on entirely different grounds from an indictment. The officer by whom the information was presented being always in court, it may, on his application, be amended to any extent which the judge admits to be consistent with the ordinary conduct of judicial business, with the public interest and with private rights. There was no error in allowing the information to be amended.

The next error complained of is more serious and is fatal to this judgment. It is necessary to find the value of the property received in order to fix punishment under the statute, and this is an indispensable requisite. As said by the late Mr. Justice Baker in The People v. Ellison, 185 Ill. 287:

"It is settled in this State by repeated decisions that whenever the measure or kind of punishment depends on the value of the property stolen, the jury, or court when the trial is by the court, must find that value as part of the verdict or finding, and that without such finding the conviction cannot be supported. Highland v. People, 1 Scam. 392; Sawyer v. People, 3 Gil. 53; Hildreth v. People, 32 Ill. 36; Collins v. People, 39 id. 233; Williams v. People, 44 id. 478; Tobin v. People, 104 id. 566; Thompson v. People, 125 id. 256."

For the error indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

190 - 22617

EDWARD MEISEL,
Defendant in Error.

vs.

WILLIAM KALMS,
Plaintiff in Error.

203 I.A. 297

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This action was based upon an architect's certificate for \$350, being the balance due under a building contract between plaintiff, the contractor, and defendant, the owner of the building upon which the work under the contract was done. On a trial before the court judgment was rendered for the amount of the architect's certificate.

There is no dispute as to the amount due or the propriety of the architect's issuing the certificate. It was issued in pursuance of authority vested in the architect by the contract.

The only defense interposed was the contract, which contained this provision:

"If at any time there shall be evidence of any lien or claim for which, if established, the owner of the said premises might be liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify him against such lien or claim."

A deputy clerk of the Circuit Court was sworn, who testified that the records of the clerk's office showed that a claim for a lien for a balance of \$257 was filed July 31, 1915, by one William Koch on the premises owned by defendant and covered by the contract in evidence.

725 .A.1802

RECEIVED BY THE DIRECTOR OF THE BUREAU OF THE ARMY

1890

DATE: 11/11/1964

1

[illegible]

THE ABOVE INFORMATION WAS OBTAINED FROM THE OFFICE OF THE ATTORNEY GENERAL, NEW YORK.

judgment was rendered for the amount of the mortgage's
indebtedness. On a trial before the court
remanded, the owner of the building also was
certificated for \$500. Being the balance due under a valid
this action was based upon an affidavit's

There is no dispute as to the amount due to the property of the creditor's family and the estate. It was issued in pursuance of a court order in the estate of the deceased.

which contained this information:

[illegible]

by defendant and covered by the contract in question.

Plaintiff admitted on cross-examination that Koch was a sub-contractor under him. By Sec. 33 of the Mechanic's Lien Act it is provided that a "petition shall be filed or suit commenced to enforce the lien * * within four months after the time that the final payment is due the sub-contractor, laborer or party furnishing material." From such notice of lien it did appear that Koch completed the work under his sub-contract with plaintiff June 22, 1915. This suit was commenced March 22, 1916, long after the expiration of the four month period which Koch had to commence suit to enforce his claim of lien. As defendant made neither proof nor claim that any suit had been commenced by Koch or was pending at the time of the trial, we will assume no suit was in fact pending or had been commenced. Koch lost his lien in failing to commence a suit to enforce it within four months of the time when he completed the work. If defendant desired to avail of the defense of a subsisting lien, for which he or his property was liable, it was incumbent upon him to produce evidence to sustain it. This he failed to do. It was therefore patent that the defense that Koch had some lien as a sub-contractor failed.

Defendant is carpingly critical of the expeditious manner in which the trial Judge disposed of the case and gave judgment. There was certainly no reason for the Judge to hesitate as to the conclusion at which he should arrive. There was no legal defense interposed, and defendant had no other defense ready to produce. Neither did he show any legal reason why, if he had any other proofs, they were not ready to be submitted.

Defendant has failed to show any meritorious defense. The architect's certificate was issued by the architect of defendant under the contract, and there was

plaintiff admitted on cross-examination that such was a sub-
contractor under him. By Dec. 31 of the preceding year
Act it is provided that a "petition shall be filed or writ
commenced to enforce the lien" within five months
after the time that the final payment is due the sub-
contractor, laborer or party furnishing material." From
such notice of lien it did appear that such completed the
work under his sub-contract with plaintiff June 15, 1911.
This suit was commenced March 22, 1913, some after the ex-
piration of the four month period which had to com-
mence suit to enforce his claim of lien. As defendant made
neither proof nor claim that any suit had been commenced
by such or was pending at the time of the trial, he will
assume no suit was in fact pending or had been commenced.
Heon lost his lien in failing to commence a suit to en-
force it within four months of the time when he completed
the work. If defendant desired to avail of the defense of
a defective lien, for which he or his agents are liable,
it was incumbent upon him to produce evidence to establish it.
This he failed to do. It was therefore held that the de-
fense that such was a sub-contractor failed.
Defendant is primarily entitled of the ex-
ditions manner in which the trial judge disposed of the
case and gave judgment. There was certainly no reason for
the judge to persist in the conclusion as to the amount
awarded. There was no legal defense interposed, and defendant
had no other defense ready to produce. Neither did he show
any legal reason why, if he had any other ground, that were
not ready to be established.
Defendant was failed to show any defenses
defense. The plaintiff's certificate was issued by the
architect of defendant under the contract, and there was

no evidence that defendant was liable to pay any claim to Koch or any other person claiming under the contract between himself and plaintiff. There was no excuse for his withholding the amount due under the architect's certificate, and the judgment of the Municipal Court is affirmed.

AFFIRMED.

no evidence that defendant was liable to pay any claim as
such or any other person claiming under the contract be-
tween himself and plaintiff. There was no evidence for his
alleging the contract was under the plaintiff's control.
and the judgment of the trial court is affirmed.

APPROVED.

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

ARTHUR MEYERS,

Plaintiff in Error.

203 I.A. 298

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a writ of error sued out to reverse a conviction of defendant for violating sec. 57, a 1, chap. 38, R. S.

The defendant was proceeded against by information, waived a trial by jury, and the cause was tried before the court on a plea of not guilty.

We will not go through the moral muck and slime involved in the facts constituting the offense of which defendant was found guilty by the trial Judge; a due regard for public decency forbids. Suffice it to say that the trial Judge might properly find from the evidence beyond all reasonable doubt that defendant was guilty of the crime alleged against him in the information. Counsel, however, argue that defendant was not found guilty of the crime alleged against him in the information, but of another and different offense. This contention is not, however, sustained by the record. On turning to that document we find this recitation: "the court being fully advised in the premises finds the defendant Arthur Meyers guilty in manner and form as charged in the information herein"; and the sentence of six months in the House of Correction follows.

The objection to the testimony of McDonald, a particeps criminis with defendant, is without avail. He was

203 I.A. 298

CHIEF OF POLICE
CITY OF CHICAGO

PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,
vs.
ARTHUR WEISS,
Plaintiff in Error.

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

This is a writ of error used and to reverse a
conviction of defendant for violation sec. 27, c. 1, Chap.
38, P. S.

The defendant was proceeded against by informa-
tion, asked a trial by jury, and the case was tried be-
fore the court on a plea of not guilty.

We will not go through the whole work and show
involved in the facts concerning the offense of which the
defendant was found guilty by the trial judge; a due regard for
public decency forbids. Suffice it to say that the trial
judge might properly find from the evidence before him reason-
able doubt that defendant was guilty of the crime alleged
against him in the information. However, where the
defendant was not found guilty of the crime alleged against
him in the information, but of another and different offense.
This contention is not, however, sustained by the record. On
turning to that account as this contention: "The court
being fully advised in the premises that the defendant therein
guilty in manner and form as charged in the information
herein"; and the sentence of six months in the house of cor-
rection follows.

The objection to the testimony of defendant, a
certainly remains with defendant, is without avail. He was

a competent and material witness and his testimony condemnatory of defendant was proper to be heard as proof.

It is also argued that defendant was not an inmate of the immoral place set out in the information. Without going into the particulars of the situation we will rest content by holding that he was such inmate within the reasoning and decision of this court in People v Rice, general number 22135, not yet reported.

There is no reversible error in this record and the judgment of the Municipal Court is affirmed.

AFFIRMED.

a competent and material witness and his testimony concerning
the facts of the case is proper to be heard as proof.
It is also agreed that defendant was not an in-
mate of the mental place set out in the information. With-
out going into the particulars of the situation we will reas-
sonably assume by noting that he was such inmate within the reason-
ing and decision of this court in People v. Rizzo, General num-
ber 22135, not yet reported.

There is no reversible error in this record and
the judgment of the Appellate Court is affirmed.

APPROVED

JACOB MEYER, Complainant,
and ANGELO PAOLELLA et al.
Defendants,
Defendants in Error,
vs.
I. LURIA LUMBER CO. et al.,
Plaintiffs in Error.

203 I.A. 300

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

It is neither important nor necessary to state the pleadings or the nature of the actions involved in this record, as the questions before us for review do not involve either. This is a chancery cause and involves questions affecting mechanic's liens.

There are in the record an original bill and two intervening petitions, upon which issues were joined and the cause referred to a master in chancery, who was subsequently appointed as special commissioner. The original reference was made July 1, 1913. On September 24, 1915, the court ordered the special commissioner to file his report by October 6, 1915, and set the cause for hearing on that date. On October 13, 1915, the suit was dismissed at complainant's cost for want of prosecution. On February 14, 1916, intervening petitioners made a motion to set aside the order of dismissal and on the 11th of March thereafter that motion was denied.

Two questions are presented for our determination - First, did the trial court commit reversible error in dismissing the suit? Second, did the court err in denying the motion to vacate the order of dismissal?

We will observe in passing that the original

203 I.A. 800

RECORD TO DIRECTOR
BY COURT ORDER

LABOR UNION, Defendant,
and ARTHUR JACOBSON et al.,
Defendants,
Defendants in Error,
vs.
I. LLOYD JACOBSON CO., et al.,
Plaintiffs in Error.

ALL OTHERS BEING HELD TO THE ORDER OF THE COURT.

It is neither important nor necessary to state the findings or the nature of the action involved in this record, as the questions before us for review do not involve either. This is a summary cause and involves questions of facting mechanical items.

There are in the record an original bill and two intervening petitions, upon which issues were raised and the cause referred to a master in chancery, who was subsequently appointed as special commissioner. The original reference was made July 1, 1915. On September 24, 1915, the court ordered the special commissioner to file his report by October 6, 1915, and set the cause for hearing on that date. On October 13, 1915, the bill was dismissed as complainant's case for want of prosecution. On February 14, 1916, intervening petitioners made a motion to set aside the order of dismissal and on the 15th of March thereafter that motion was denied.

Two questions are presented for our determination - First, did the trial court commit reversible error in dismissing the suit second, did the court err in denying the motion to vacate the order of dismissal?

complainant finds no fault with any of the proceedings or the present condition of his bill. The intervening petitioners are the only plaintiffs in error.

At the threshold of this inquiry an examination of the record discloses the fact that there is no certificate of evidence in the record. The record is a hotch-potch. It contains notices, motions, affidavits, etc., which have no place in the record, but which, to present matters thus involved to the court for review, should be embodied in a certificate of evidence. We must therefore assume that the court proceeded regularly in ordering the special commissioner to file his report and in setting the case for hearing. We shall presume also that proper notices were given and that the parties were in court at the time the order was entered upon the special commissioner to file his report and the cause was set for hearing. This being so, it was the duty of the parties to be present in court when the cause was called for trial, and in their absence it was proper for the court to enter the order of dismissal for want of prosecution, as it did.

It does appear that the cause had been pending two and a half years, and that the parties had been tardy in prosecuting the suit. It was the duty of the special commissioner to comply with the order of the court and to have had his report in court in accord with that order; and furthermore, it devolved upon the parties to close their proofs within the time limited by the order, or so much earlier as to enable the commissioner to comply with the order to make and file his report. While ordinarily a chancery suit will not be dismissed while the cause is on reference before a master, still, at the time of the dismissal the re-

complaint finds no fault with any of the proceedings or
the present condition of his bill. The intervening party
therefore has no objection to the order.

At the request of this party an answer

is made to the second allegation of the fact that there is no cer-
tificate of evidence in the record. The record is a mere
copy. It contains notices, motions, affidavits, etc.,

which have no place in the record, but which, to prevent
matters from involving the court for review, should be
included in a certificate of evidence. The court therefore

assumes that the court proceeded regularly in ordering

the special commission to file his report and in setting
the case for hearing. The bill presents also that proper

notice was given and that the parties were in court at

the time the order was entered upon the special commission
to file his report and the same was set for hearing. This

being so, it was the duty of the parties to be present in

court when the same was called for trial, and in their ab-

sence it was proper for the court to enter the order of

dismissal for want of prosecution, as it did.

It does appear that the cause had been pending

for over a half year, and that the parties had been twice

in prosecuting the bill. It was the duty of the parties

consequently to comply with the order of the court and to

have had the cause brought to court in order to file their

testimony, if they were upon the parties to this bill.

There is within the time limited by the court, or to whom

refused as to answer the commission. It seems that the

order to show and file the report. While obviously a necessary

act it will not be insisted upon the same as to return the

bill to court, still, as the bill of the defendant is re-

port of the commissioner should have been in court so that the cause might have proceeded to trial on the day it was set for trial. We think the court in Weil v. Mulvaney, 262 Ill. 200, anticipated a cause somewhat in the condition of that of the instant case at the time of the order of dismissal, when it said:

"We are not prepared to hold that the dismissal of a bill in chancery for want of prosecution while the cause is still pending on a reference to a master might not, under certain circumstances, be proper. The failure to prosecute might consist in a failure to proceed under the order of reference to the master or to take any steps in preparation for the final disposition of the cause."

Furthermore, the bill was dismissed at plaintiffs' cost for want of prosecution, and we doubt whether any of the parties other than complainant can invoke a writ of error, as there is no judgment against any of the parties except complainant. Hedges v. Mace, 72 Ill. 474.

There are no errors assigned which are reviewable on the record before us.

The court had no jurisdiction to entertain the motion to vacate the order of dismissal after the lapse of the term at which the order was entered. An order dismissing the bill for want of prosecution is a final order.

The order of the Circuit Court dismissing the bill for want of prosecution is affirmed.

AFFIRMED.

port of the commission should have been in court as
that the cause might have proceeded to trial on the day it
was set for trial. We think the court in Smith v. Murray,
1851 111. 100, notwithstanding a cause occurred in the condition
of that of the instant case at the time of the order of
dismissal, was correct.

"We are not disposed to take this the dismissal
of a bill as necessary for want of prosecution while the cause
is still pending on a reference to a master might not, under
certain circumstances, be proper. The failure to prosecute
might consist in a failure to proceed under the order of
reference to the master or to take any steps in prepara-
tion for the final disposition of the cause."

Furthermore, the bill was dismissed on plain-
tiff's cost for want of prosecution, and we doubt whether
any of the parties could then complain and invoke a
bill of error, as there is no judgment against any of the
parties except complainant. McGraw v. Kane, 72 Ill. 494.

There are no errors assigned which are review-
able on the record before us.
The court had no jurisdiction to set aside the
order to remove the order of dismissal after the lapse of
the term at which the order was entered. An order dissolving
the bill for want of prosecution is a final order.
The order of the circuit court dismissing the
bill for want of prosecution is affirmed.
AFFIRMED.

EMELIE MUNDSTOCK,
Appellee,
vs.
HERMAN MUNDSTOCK,
Appellant.

203 I.A. 302

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

A divorce for the adultery of defendant was granted to complainant with alimony and solicitor's fees. Defendant appeals and urges that the divorce decree is contrary to the evidence and the alimony awarded barred by a post nuptial agreement between the parties.

The least said about the adultery of defendant the better for the morals of all concerned. If ever a case of adultery was clearly proven in judicial annals, this is that case. Adultery is often characterized as a dark and secret crime, in the committing of which the parties are seldom surprised. Proof most often rests in acts, conditions and the propinquity of the parties which in themselves raise a well-grounded inference that the adultery charged has been committed. Here, however, defendant made no secret of his adulterous acts. He on several occasions committed the act constituting adultery with an intemperate and otherwise dissolute woman openly in the presence of a man acquaintance. While it is true that defendant denies that he ever committed adultery with this woman, the evidence aside from that of the eye witness abundantly establishes the fact that defendant, his adulterous companion and the witness to the adulterous acts were sleeping side by side in a barn at the several

203 I.A. 803

UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

AMALIA KORNSTOCK,
Appellee,
vs.
NICHOLAS KORNSTOCK,
Appellant.

THE COURT HEREBY AFFIRMS THE DECISION OF THE JURY.

A divorce for the entirety of defendant was granted to complainant with alimony and defendant's share of the marital property and the alimony was awarded by a jury of the court.

The jury said that the entirety of defendant was the better for the sake of all concerned. It was a case of necessity was clearly proven in the marital property. This is the fact. Alimony is often considered as a right and hence it is in the condition of which the parties are without property. They must often live in poverty.

Condition and the propriety of the parties which in themselves make a self-sufficient statement that the entirety should have been awarded. Here, however, the defendant made no record of his substantial work. He in fact was considered the not considered, thereby with no income and otherwise also made no record in the testimony of a non-requirement. While it is true that the defendant denied that he ever committed adultery with his woman, the evidence was from that of the wife's testimony. The jury said that the entirety of the parties was the better for the sake of all concerned. It was a case of necessity was clearly proven in the marital property. This is the fact. Alimony is often considered as a right and hence it is in the condition of which the parties are without property. They must often live in poverty.

times when the witness swears that defendant was guilty of adulterous acts with the woman who on these occasions was his companion and who was, as a matter of fact, living with him in an adulterous relationship under the guise of serving him as his housekeeper. The learned Chancellor who tried the case could not have correctly arrived at any other conclusion than that defendant was proven to be guilty of the adultery charged. Complainant was on the evidence entitled to a decree of divorce for adultery.

The post nuptial contract is no defense against defendant's liability for alimony. This contract is not susceptible of the interpretation claimed - that it was made to bar complainant's right to alimony. At the time the contract was made neither of the parties contemplated a divorce; nor was the contract made in contemplation of divorce proceedings of either against the other. The fact is that the parties owned two pieces of real estate; one of record in the name of complainant and the other held in joint tenancy by both of the parties, as shown of record. The contract recites that differences had arisen between the parties in relation to the ownership of the property, and both being desirous of settling such differences, the pieces of property were conveyed to complainant, she paying defendant \$2500 in money and assuming an encumbrance thereon of \$1400, evidenced by the notes of both parties, which complainant agreed to pay and to hold defendant indemnified from any liability therefor. As a further consideration of the contract, conveyance, the payment of the \$2500, and the assumption of the \$1400 of indebtedness, each released all claim in or to the real or personal property of the other then owned or afterwards to

times when the witness saw that defendant was living at
admitted with him the same day on these occasions was
his companion and was, as a matter of fact, living
with him in an intimate relationship under the guise of
serving him as his housekeeper. The learned Commissioner
who tried the case could not have been misled as to
any other connection than that defendant was known to be
guilty of the adultery charged. Complaint was on the
evidence available to a decree of divorce for adultery.

The last united contract is an alleged contract
between the parties for adultery. This contract is not
admissible as evidence in the instant case - that it was
made as a compromise to settle the claim for adultery. At the time
the contract was made neither of the parties had been
divorced; nor was the contract made in contemplation of
divorce proceedings of either against the other. The
fact is that the parties were in a state of legal estrangement
one of them in the name of husband and the other
was in legal estrangement from both of the parties, as shown by
record. The contract was made for the purpose of settling the
claim for adultery in relation to the ownership of the
property, and with the intent of settling said claim.
Therefore, the claim of adultery was admitted to some
extent, the party defendant was in a state of legal
estrangement from both of them, admitted by the record of
said parties, which complaint served to pay was to hold
defendant inadmissible from any further claim. As a
further consideration of the contract, defendant, who was
sent on the 12th, and the dissolution of the claim of ad-
ultery, then returned and filed in the court a
petition for divorce of the other then named as defendant as

be acquired by either, and also agreed that the survivor waived and released all claims of dower, homestead rights, widow's award, or other rights or interest in and to the property of which the one first dying should be seized at the time of his or her death.* There is nothing in this contract which relieved the defendant from the burthen of the duty which the law cast upon him to thereafter maintain and support his wife, which, so long as he lives, the law requires and demands at his hands in accord with his financial ability. While at defendant's death complainant will have no claim to or interest in his estate, this condition does not relieve him from the payment of alimony following a divorce granted for his own fault.

Whether or not it would have been contrary to public policy for the parties to have contracted to waive the liability of the husband for alimony upon a divorce being granted for his misconduct, it is not necessary for us to decide, because neither by the language used in the contract, nor by inference nor interpretation of any such language can it be held that such liability was anticipated or in contemplation by the parties. The court will not by construction or interpretation broaden the terms employed or read any waiver into the contract not fairly deducible from the language appearing in it. As the contract is silent as to any such liability, the law will settle the liability according to the status of the parties at the time the bill was filed. The status of the parties to each other at such time was that of husband and wife. The husband was therefore liable for the reasonable support of his wife, so long as they were husband and wife, in accord with his financial ability and their station in life.

Under Sec. 18, Chap. 40 R. S., it was the duty of the Chancellor on granting a decree of divorce for the fault of defendant, to award alimony as well as solicitor's fees in favor of complainant. Spitler v. Spitler, 108 Ill. 120; Walter v. Walter, 189 Ill. App. 345.

The amount awarded by the decree for alimony and solicitor's fees, when measured by the financial ability of defendant to pay and the necessity of complainant for financial aid in her support, is reasonable and just and conforms to well settled practice in this class of cases in this jurisdiction.

The decree of the Circuit Court does justice between the parties and is therefore affirmed.

AFFIRMED.

Under Sec. 15, D.C., as amended, 48 U.S.C. 11, it was the duty of the
 General in exercising a decree of divorce for the benefit
 of defendant, to award alimony as well as defendant's fees
 in favor of complainant. Wright v. Wright, 108 Ill. 100.
Wright v. Wright, 108 Ill. App. 343.

The amount awarded by the decree for alimony
 and solicitor's fees, were awarded by the General in
 defendant's favor, and the necessity of complainant for
 defendant was in fact supported, as defendant was just and
 entitled to full relief in this class of cases
 in this jurisdiction.

The decree of the District Court does not
 between the parties and is therefore affirmed.
 AFFIRMED.

A. L. ST. GEORGE,
Appellant,

vs.

JAMES A. PRINTY,
Appellee.

203 I.A. 304

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago against defendant, claiming false and fraudulent representations in the sale by defendant to her of a violin. The case was submitted for trial without a jury, and the court entered judgment in favor of the defendant. The case is brought here by appeal.

// The evidence in the record tends to prove that the plaintiff is a native of Italy; that she had been in this country but a short time prior to October 11, 1913, when she purchased the violin in question from the defendant, paying him therefor \$150; that at the time of such purchase she was able to speak English but slightly; that she and her husband went to defendant's residence, and that the defendant had represented to them that the violin was very old and was hand-made, that it was worth \$200, and was a good copy of an Amati; that neither she nor her husband knew anything about violins, and that they relied upon the defendant's representations. //

Upon the trial plaintiff's counsel offered to prove by plaintiff's husband that the representations in question were in fact made by defendant. The court refused to permit the husband to testify as to representations made by the defendant in a conversation between the defendant, the

2031.A.304
 CHICAGO MUNICIPAL COURT
 OF CHICAGO

A. L. ST. CLARK,
 Appellant,
 vs.
 JAMES A. PRINCE,
 Appellee.

THE JUSTICE DEPARTMENT HAS REVIEWED THE DECISION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago against defendant, claiming false and fraudulent representations in the sale by defendant to her of a violin. The case was submitted for trial without a jury, and the court entered judgment in favor of the defendant. The case is brought here by appeal.

The evidence in the record tends to prove that the plaintiff is a native of Italy; that she had been in this country but a short time prior to October 11, 1915, when she purchased the violin in question from the defendant, paying him therefor \$150; that at the time of such purchase she was able to speak English but slightly; that she and her husband went to defendant's residence, and that the defendant had represented to them that the violin was very old and was hand-made, that it was worth \$200, and was a good copy of an Amati; that neither she nor her husband knew anything about violins, and that they relied upon the defendant's representations.

Upon the trial plaintiff's counsel offered to prove by plaintiff's husband that the representations in question were in fact made by defendant. The court refused to permit the husband to testify as to representations made by the defendant in a conversation between the defendant,

plaintiff and her husband.

Plaintiff testified that she learned on October 30, 1915, for the first time that the violin she purchased from defendant was not a copy of an Amati; that it was not an old, hand-made instrument, but was a cheap, German factory-made violin, constructed so as to deceive inexperienced buyers, and that it was worth from \$35 to \$50. This evidence of the plaintiff is supported to some extent by that of another witness.

Plaintiff urges as grounds for a reversal of the judgment that the finding and judgment are against the law and the evidence, and that the court erred in not permitting her husband to testify.

The evidence in the case is conflicting, and had no error intervened at the trial we should not feel justified in interfering with the conclusion of the court below. It is our opinion, however, that the trial judge erred in excluding the testimony of plaintiff's husband. Under section 5 of chapter 51, Hurd's R. S., Illinois, a husband is not in general competent to testify to any transaction or conversation had during the marriage, in an action where the wife is a party. This section, however, excepts cases where the suit involves the separate property right of the wife, and cases where the husband has acted as the agent of such wife. The record establishes the fact that plaintiff's husband was present and did much of the talking with the defendant at the time the purchase of the violin was consummated. He attempted on the trial to testify to what representations were made by Printy, the defendant, to plaintiff and himself at that time. Objection was made to

plaintiff and her husband.

Plaintiff testified that she learned on October 30, 1919, for the first time that the violin she purchased from defendant was not a copy of an Amati; that it was not an old, hand-made instrument, but was a cheap, German factory-made violin, constructed so as to deceive expert players, and that it was worth from \$35 to \$50. This evidence of the plaintiff is supported to some extent by that of another witness.

Plaintiff urges as grounds for a reversal of the judgment that the finding and judgment are against the law and the evidence, and that the court erred in not permitting her husband to testify.

The evidence in the case is conflicting, and

had no error intervened at the trial we should not feel justified in interfering with the conclusion of the court below. It is our opinion, however, that the trial judge erred in excluding the testimony of plaintiff's husband. Under section 6 of chapter 51, R.S. 1919, Illinois, a husband is not in general competent to testify to any transaction or conversation had during the marriage, in an action where the wife is a party. This section, however, excepts cases where the suit involves the separate property right of the wife, and cases where the husband has acted as the agent of such wife. The record establishes the fact that plaintiff's husband was present and did much of the talking with the defendant at the time she purchased the violin and was connected. He attempted on the trial to testify to what representations were made by him, the defendant, to plaintiff and himself at that time. Objection was made to

this testimony and the court sustained the objection on the ground that a husband cannot testify to conversations had between himself and the defendant in the presence of the witness' wife who is a party plaintiff in the suit.

"The objection that the husband of plaintiff was not a competent witness for his wife, is not well taken. The statutory disability is confined to the wife being competent to testify for her husband but does not affect the competency of the husband to testify in the wife's interest. Section 5, chapter 51, Revised Statutes, provides that where the wife would, if unmarried, be plaintiff or defendant, and where the litigation shall be concerning her personal property, the husband may testify in her behalf. Johnson v. McGregor, 157 Ill. 350. Plaintiff in this case sought to recover damages for an assault and battery made upon her by defendants. Her being covert in no way affected her right to maintain such action. The right was personal to herself, and her husband was therefore a competent witness in her behalf in force of the statute supra." Rago v. Veneziano, 155 Ill. App. 557.

We think that the evidence in this case satisfactorily shows that in the transactions referred to here the husband was in fact acting as agent for his wife; she was unable to speak much English, and the evidence tends to show that the business of purchasing the violin was in the main transacted between defendant and the plaintiff's husband. The mere fact that she was present and took some part in the conversation which finally resulted in the sale of the violin did not, as a matter of law, prevent her husband from acting at that time and under those conditions as her agent.

The judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

this testimony and the court sustained the objection on the ground that a husband cannot testify in conversations had between himself and the defendant in the presence of the witness, who is a party plaintiff in the suit.

"The objection that the husband of plaintiff was not a competent witness for his wife, is not well taken. The statutory disability is confined to the wife being competent to testify for her husband but does not affect the competency of the husband to testify in the wife's interest. Section 5, Chapter 51, Revised Statutes, provides that where the wife would, if unmarried, be plaintiff or defendant, and where the litigation shall be concerning her personal property, the husband may testify in her behalf. Johnson v. Hogge, 187 Ill. 550. Plaintiff in this case sought to recover damages for an assault and battery made upon her by defendants. Her being governed in no way affected her right to maintain such action. The right was personal to herself, and her husband was therefore a competent witness in her behalf in force of the statute supra." Page v. Venetians, 187 Ill. App. 527.

We think that the evidence in this case satis-

factorily shows that in the transactions referred to here the husband was in fact acting as agent for his wife; she was unable to speak much English, and the evidence tends to show that the business of purchasing the violin was in the main transacted between defendant and the plaintiff's husband. The mere fact that she was present and took some part in the conversation which finally resulted in the sale of the violin did not, as a matter of law, prevent her husband from acting at that time and under those conditions as her agent. The judgment of the Municipal Court will be re-

versed and the cause remanded.

REVEREND AND HONORABLE

L. S. DICKY,
Appellee,

vs.

MARY WELLS, THOMAS E. WELLS,
JOHN E. WELLS, PRESTON A.
WELLS, Trustees under the
will of Thomas Edmund Wells,
deceased,
Appellants.

203 I.A. 305
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff was the lessee of an apartment in the steam-heated apartment building owned by the defendants. In April, 1914, the defendants were engaged in cleaning and repairing work in the building, and at the request of plaintiff's wife they removed a radiator from a bedroom and another from the dining room of the apartment; a few days thereafter the defendants placed a cap on the open pipe in the bedroom. The pipe in the dining room from which the radiator had been detached was left uncapped until the month of September, 1914, although plaintiff's wife had called the attention of one Wallace, defendants' foreman, and also the janitor of the building to it, and they had promised to protect it. During the absence of plaintiff and his family from the city, on September 10, 1914, steam was turned on in the building and the property of plaintiff was damaged by steam which escaped from the unprotected pipe in the dining room.

Judgment was entered in the Municipal Court in favor of plaintiff for the sum of \$110.90, and defendants bring the case here by appeal for review.

Notwithstanding the fact that this court has frequently called attention to the existence of its rules with relation to abstracts of record, the abstract in this case fails to comply with Rule 18 and is a mere index to the record.

2081A.808
 FROM THE OFFICE OF THE
 CLERK OF THE COURT

OF CHICAGO.

L. S. DICKER, Appellee,

vs.

MARY KELLS, THOMAS E. KELLS,
 JOHN E. KELLS, FREDERICK A.
 KELLS, Trustees under the
 will of Thomas Edward Kells,
 Appellants.

MR. JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

The plaintiff was the lessee of an apartment in the steam-heated apartment building owned by the defendants. In April, 1914, the defendants were engaged in cleaning and repairing work in the building, and at the request of plaintiff's wife they removed a radiator from a bedroom and another from the dining room of the apartment; a few days thereafter the defendants placed a cap on the open pipe in the bedroom. The pipe in the dining room from which the radiator had been detached was left uncapped until the month of September, 1915, although plaintiff's wife had called the attention of the police, defendants' foreman, and also the janitor of the building to it, and they had promised to protect it. During the absence of plaintiff and his family from the city, on September 10, 1914, steam was turned on in the building and the property of plaintiff was damaged by steam which escaped from the uncapped pipe in the dining room.

Judgment was entered in the Municipal Court in favor of plaintiff for the sum of \$110.00, and defendants bring the case here by appeal for review. Notwithstanding the fact that this court has frequently called attention to the existence of the rules which relation to abstracts of records, the abstract in this case fails to comply with Rule 18 and is a mere index to the record.

and for this reason, if for no other, the judgment should be affirmed.

The defendants' main contentions are that the provisions of the lease under which plaintiff held the premises in question exempted defendants from any liability for the injuries alleged, in that it was not shown that they resulted from a "positive wrongful act" of the defendants, and that the verdict of the jury is against the manifest weight of the evidence.

We do not think there is much merit in either contention. Counsel for defendants rely upon a clause in the lease which, after providing for liability on the part of the lessee for almost every possible contingency that might occur in and about the demised premises, exempts the defendants from liability for any damage occasioned by steam and water pipes, etc., "except from the positive wrongful act of the lessor herein, or his employees." The radiator in question and the steam-heating plant of the building were, after the removal of the radiator from the dining room in April, 1914, in the possession and control of the defendants and their employees, and we are inclined to the opinion that the unprotected condition of the steam pipe in the dining room of plaintiff's apartment was the result of a positive wrongful act on the part of defendants' employees.

It is also our opinion that there was ample evidence taken at the trial to warrant the verdict of the jury and the judgment of the trial court.

The judgment in favor of plaintiff will be affirmed,

AFFIRMED.

and for this reason, if for no other, the judgment should be affirmed.

"The defendants' main contentions are that the provisions of the lease under which plaintiff held the premises in question exempted defendants from any liability for the injuries alleged, in that it was not shown that they resulted from a "positive wrongful act" of the defendants, and that the verdict of the jury is against the heaviest weight of the evidence.

We do not think there is much merit in either contention. Counsel for defendants rely upon a clause in the lease which, after providing for liability on the part of the lessee for almost every possible contingency that might occur in and about the defined premises, exempts the defendants from liability for any damage occasioned by steam and water pipes, etc., "except from the positive wrongful act of the lessor herein, or his employees." The register in question and the steam-heating plant of the building were, after the removal of the register from the dining room in April, 1914, in the possession and control of the defendants and their employees, and we are inclined to the opinion that the untested condition of the steam pipe in the dining room of plaintiff's apartment was the result of a positive wrongful act on the part of defendants' employees.

It is also our opinion that there was ample evidence taken at the trial to warrant the verdict of the jury and the judgment of the trial court.

The judgment in favor of plaintiff will be affirmed.

ATTEST.

In the matter of petition of
FRANTISKA DVORAKOVA, arrested
at the suit of MARY TREMBACZ,

On appeal of MARY TREMBACZ,
Appellant,

vs.

FRANTISKA DVORAKOVA,
Appellee.

203 I.A. 312

APPEAL FROM COUNTY COURT,
COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the County Court of Cook County releasing Frantiska Dvorakova from the custody of the sheriff of Cook County.

A petition filed January 5, 1916, in the County Court sets up that the petitioner, Frantiska Dvorakova, had been arrested under a writ of Ca. Sa. issued out of the Municipal Court of Chicago in favor of Mary Trembacz for the sum of fifty dollars and costs; that the petitioner was then in the custody of the sheriff under and by virtue of said writ, and that she was entitled to her release from such custody under the laws of the State relating to insolvent debtors.

On the trial in the County Court a certified copy of a judgment of the Municipal Court was introduced in evidence, from which it appears that a judgment was entered in that court on the 22nd day of November against petitioner for the sum of fifty dollars and costs.

The record of the trial in the County Court does not disclose the nature of the cause of action in which the judgment was entered in the Municipal Court, nor does it disclose whether the judgment was based upon a verdict or, if so, what the verdict of the jury was. In a colloquy between counsel and the court the following appears:

2081A.312

ALABAMA COURT REPORT

COURT REPORT

In the matter of petition of
FRANKLIN D. DAVIS, et al.,
at the suit of ALABAMA
ON BEHALF OF ALABAMA
Applicant,
vs.
FRANKLIN D. DAVIS, et al.,
Appellee.

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the County Court of Cook County relating to the petition of the County of Cook County, filed January 3, 1916, in the County Court, to set aside a writ of habeas corpus issued out of the County Court at Chicago in favor of said petitioner for the sum of fifty dollars and costs; that the petitioner was not in the custody of the sheriff under and by virtue of said writ, and that she was entitled to her release from such custody, under the laws of the State relating to involuntary detention. On the first of the County Court a copy of a judgment of the Municipal Court was introduced in evidence, from which it appears that a judgment was entered in that court on the third day of November, 1915, for the sum of fifty dollars and costs. The record of the trial in the County Court does not disclose the nature of the cause of action in which the judgment was entered in the Municipal Court, nor does it disclose whether the judgment was based upon a verdict or, if so, what the verdict of the jury was. In a colloquy between counsel and the court the following appears:

The Court: "The verdict was for \$50?"

Mr. Peska: "In manner and form as charged in the statement of claim."

A document was introduced in evidence which counsel called a statement of claim, but that it was ever filed in the Municipal Court or that it had become a pleading in any litigation in that court does not appear by a certificate of the clerk of that court or otherwise. From the body of the paper it appears that Mary Trembacz complained that Frantiska Dvorakova had maliciously caused her arrest for disorderly conduct. The evidence submitted to the trial court did not tend to prove that the judgment of the Municipal Court was entered in an action of which malice was the gist. As a matter of fact, the only evidence which was properly admitted in the County Court was the record of the judgment of the Municipal Court, and this does not in any way disclose the nature of the claim, evidence or verdict upon which the judgment was based.

The judgment of the County Court will be affirmed.

AFFIRMED.

The Court: "The verdict was for \$5000"
 Mr. Leary: "In answer and found as alleged in
 the statement of claim."

A document was introduced in evidence which
 counsel called a statement of claim, but that it was ever
 filed in the Municipal Court or that it had become a stand-
 ard in any litigation in that court does not appear by a
 certificate of the clerk of that court or otherwise. From
 the body of the paper it appears that Mary Tremblay com-
 plained that William Dwyer had maliciously caused
 her arrest for libelous conduct. The evidence submitted
 to the trial court did not tend to prove that the judgment
 of the Municipal Court was entered in an action of which
 William was the plaintiff. As a matter of fact, the only evidence
 which was properly admitted in the County Court was the tes-
 timony of the judgment of the Municipal Court, and this does
 not in any way disprove the truth of the claim, evidence or
 verdict upon which the judgment was based.
 The judgment of the County Court will be af-

irmed.

1911-12

203 I.A. 316

SIDNEY L. STEIN and EDWARD J.
EHRHARDT, copartners, trading
as Stein & Ehrhardt,

Defendants in Error,

vs.

HERMAN EMERMAN, doing business
as H. Emerman & Company,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Suit was brought in the Municipal Court by
plaintiffs on the following contract:

"It is hereby understood and agreed that Stein
& Ehrhardt are to receive \$400.00 as their part of com-
mission in the event the loan of \$18,500.00, second
mortgage is made and accepted on the property at 4513-35
Clifton avenue, and this amount is to be paid to you when
moneys are paid over on the second mortgage.

H. EMERMAN.

Accepted this 16th day of June, A. D. 1915.

STEIN & EHRHARDT."

The judgment of the Municipal Court was in fa-
vor of plaintiffs for the sum of \$400, and the case comes
here on writ of error for review.

The parties to the suit are real estate brokers,
and it is gathered from the record that plaintiffs did in
fact procure "a customer ready and willing and able to make
the loan," but that Emerman for reasons not appearing in the
record had refused to consummate the deal; he refused to pay
over to the plaintiffs the sum of \$400, relying upon the terms
of the contract.

We are inclined to the view that plaintiffs can
not recover on the contract in question without first showing
that the loan on the premises referred to was in fact made.
It is assumed that the parties were acting in the matter as

2031 A. 316

ERROR TO MUNICIPAL COURT
OF CHICAGO.

ELMER M. STEIN and EDWARD J.
STERNBERG, co-defendants, trading
as STEIN & STERNBERG,
defendants in error.

vs.
HAROLD KAPLAN, doing business
as H. KAPLAN & COMPANY,
plaintiff in error.

THE JUDICIAL COUNCIL ADVISED THE COMMISSION OF THE COURT.

It was decided in the Municipal Court by

plaintiffs in the following contract:

"It is hereby understood and agreed that STEIN
& STERNBERG are to receive \$400.00 as their part of con-
sideration in the event the loan of \$18,800.00, second
mortgage is made and accepted on the property at 4013-35
Clifton Avenue, and this amount is to be paid to you when
money is paid over on the second mortgage.
H. KAPLAN.
Accepted this 18th day of June, A. D. 1913.
ELMER M. STEIN & EDWARD J. STERNBERG."

The judgment of the Municipal Court was in fa-

vor of plaintiffs for the sum of \$400, and the case comes
here on writ of error for review.

The parties to the suit are real estate brokers,

and it is gathered from the record that plaintiffs did in
fact procure "a customer ready and willing and able to make
the loan," but that defendant for reasons not appearing in the
record had refused to consummate the deal; he refused to pay
over to the plaintiffs the sum of \$400, relying upon the terms
of the contract.

We are inclined to the view that plaintiffs can
not recover on the contract in question without first showing
that the loan on the premises referred to was in fact made.
It is assumed that the parties were acting in the matter as

agents and not as principals; the contract involves a distribution between them of the commissions which would in the first instance have been received by the defendant in the event that the loan had been made and the moneys paid over on a second mortgage. The right of the plaintiffs was dependent upon the happening of the event referred to in the contract; it constituted a condition precedent to their right to recover.

The case is quite different from those cases in which the contracts with real estate brokers are to procure a purchaser willing, ready and able to purchase real estate; in such cases the broker has done everything required of him under his contract when he procures such purchaser. Here, however, the plaintiffs' right to recover did not rest upon their ability to procure a person ready, willing and able to make the loan; the contract specifically requires that the loan must in fact have been made and the moneys turned over before their right to compensation accrued.

"The intention (of the parties to a written contract) must be determined by considering not only the words of the particular clause, but also the language of the whole contract as well as the nature of the act required, and the subject matter to which it relates."
Bucksport, etc., R. Co. v. Brewer, 67 Me. 295.

Where the promise to pay money is conditioned upon the happening of a future event, the condition precedent must be exactly performed before the contract can be enforced. Cyclopedia of L. & P., vol. 9, p. 615; Eldridge v. Rowe, 7 Ill. 91; Kerfoot v. Steele, 113 Ill. 610.

The judgment of the Municipal Court will be reversed.

REVERSED AND JUDGMENT NIL CAPIAT.

agents and not as principals; the contract involves a distinct-
 bution between them of the commissions which would in the
 first instance have been received by the defendant in the
 event that the loan had been made and the money paid over on
 a second mortgage. The right of the plaintiffs was dependent
 upon the happening of the event referred to in the contract;
 it constituted a condition precedent to their right to re-
 cover.

The case is quite different from those cases in
 which the contracts with real estate brokers are to procure
 a purchaser willing, ready and able to purchase real estate;
 in such cases the broker has done everything required of him
 under his contract when he procures such purchaser. Here,
 however, the plaintiffs' right to recover did not rest upon
 their ability to procure a person ready, willing and able to
 make the loan; the contract specifically requires that the
 loan must in fact have been made and the money turned over
 before their right to compensation accrued.

"The intention (of the parties to a written con-
 tract) must be determined by considering not only the
 words of the particular clause, but also the language of
 the whole contract as well as the nature of the act re-
 quired, and the subject matter to which it relates."
Proctor, etc., v. Proctor, 67 N. H. 235.

Where the promise to pay money is conditioned upon
 the happening of a future event, the condition precedent must
 be exactly performed before the contract can be enforced. Cy-
 clopedia of L. & P., vol. 9, p. 613; Maribou v. Reed, 7 Ill.
 31; Perfoot v. Steele, 115 Ill. 610.
 The judgment of the Municipal Court will be re-

THOMPSON BROS. FEED COMPANY,
a corporation,

Appellee,

vs.

NEIMAN BROS. COMPANY,
a corporation,

Appellant.

203 I.A. 317

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in favor of the plaintiff, Thompson Bros. Feed Company, and against the defendant, Neiman Bros. Company. The plaintiff claimed that it had sold to the defendant certain merchandise, and that a balance was due from the defendant on an account stated of the sum of \$828.39.

T. O. Thompson, an officer of the plaintiff, testified that he had had conversations with the defendant's officers in reference to the account, and that Louis J. Neiman, treasurer of the defendant company, said that if plaintiff would allow a disputed item of \$105 the balance of the account, \$828.39, would be paid; that Alexander Neiman, president of the defendant company and a brother of Louis, also said "that he would take care of us, he would give a chattel mortgage and that everything would be all right"; that a statement of the account was mailed to the defendant every month, and that the Neimans had never questioned its correctness except as to the matter of the \$105 item which plaintiff allowed to defendant.

It is clear from the evidence in this case that the defendant company must be held to have accepted the statement of the account as presented to it, and that its duly

2031.A.317

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

THOMPSON BROS. WEED COMPANY,
a corporation,

Appellee,

vs.

WILLIAM BROS. COMPANY,
a corporation,

Appellant.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in favor of the plaintiff, Thompson Bros. Weed Company, and against the defendant, William Bros. Company. The plaintiff claimed that it had sold to the defendant certain merchandise, and that a balance was due from the defendant on an account stated of the sum of \$822.39.

T. O. Thompson, an officer of the plaintiff,

testified that he had had conversations with the defendant's officers in reference to the account, and that Louis J. Neilman, treasurer of the defendant company, said that if plaintiff would allow a disputed item of \$105 the balance of the account, \$822.39, would be paid; that Alexander Nelson, president of the defendant company and a brother of Louis, also said "that he would take care of us, we would give a chattel mortgage and that everything would be all right"; that a statement of the account was mailed to the defendant every month, and that the defendant had never questioned its correctness except as to the matter of the \$105 item which plaintiff allowed to defendant.

It is clear from the evidence in this case that

the defendant company must be held to have accepted the statement of the account as presented to it, and that its only

authorized officers had promised to provide for its payment.

The evidence heard on the trial tends to prove that the transactions between the parties to the suit extended over a period of about two years. It appears that Alexander Neiman, the president of the defendant company, had been adjudicated a bankrupt some time before the suit was brought, and he and Louis, his brother, endeavored by their testimony to prove that the claim of the plaintiff was for merchandise delivered to Alexander Neiman and not to the defendant corporation.

We are inclined to the view that the trial court was authorized under the evidence taken to find as it did, that the claim of plaintiff arose on an account stated. "Evidence of assent as to the correctness of an account may be found in circumstances from which such assent may be inferred, as where one party presents an account to another, which the latter retains without making objection within a reasonable time. * * * Where an account is rendered and only one item thereof is objected to at the time, there is an admission of the correctness of the other items to which no objections are made." 1 Cyc., pp. 375 and 378, and Neagle v. Herbert, 73 Ill. App. 17.

In State v. Ill. Central R. R. Co., 246 Ill. 246, the court said: "In ordinary business transactions, if an account has been transmitted from one individual to another it will be deemed a stated account from the presumed approbation or acquiescence of the parties, unless an objection is made thereto within a reasonable time."

The action here is based upon the new promise to pay or to provide for the payment of the balance as shown by the stated account, and on this question sufficient evi-

authorized officers had promised to provide for its payment.

The evidence heard on the trial tends to prove

that the transactions between the parties to the suit extended over a period of about two years. It appears that Alexander Nelson, the president of the defendant company, had been adjudicated a bankrupt some time before the suit was brought, and he and Louis, his brother, answered by their testimony to prove that the claim of the plaintiff was for merchandise delivered to Alexander Nelson and not to the defendant corporation.

We are inclined to the view that the trial

court was authorized under the evidence taken to find as

it did, that the claim of plaintiff arose on an account

stated. "Evidence of payment as to the correctness of an

account may be found in circumstances from which such as-

sent may be inferred, and where one party presumes an ac-

count to another, which the latter retains without making

objection within a reasonable time. * * * There is no

count is rendered and only one item thereof is objected to

at the time, there is an admission of the correctness of

the other items to which no objections are made. 1 Ann.

pp. 373 and 375, and Nelson v. Harbord, 33 Ill. App. 17.

In Smith v. D. J. Taylor, 11 N. C. 448, 449.

the court said: "In ordinary business transactions,

if an account has been transmitted from one individual to

another it will be deemed a stated account, and the payment

or acknowledgment of the parties, unless an ob-

jection is made thereto within a reasonable time."

The action here is based upon the new promise

to pay or to provide for the payment of the balance as shown

by the stated account, and on this question sufficient evi-

dence was submitted at the trial to support the findings of the trial judge.

It is contended that the Neimans, president and treasurer of the defendant company, could not bind their corporation by accepting or agreeing to the account stated. We do not agree with this contention. The plaintiff claimed that a balance was due it from the defendant for merchandise sold and delivered; it submitted to defendant a statement of its claim, and the defendant, by its proper officers, agreed in effect, according to the testimony of plaintiff's witnesses, that the statement was correct. "Appellee's suit was upon an account stated, and upon nothing else. If there were no stating of an account, then appellee had no case. * * * The president and secretary of appellant are presumed to have authority to make and render the statement in question." Pick & Co. v. Slimmer, 70 Ill. App. 358.

The defendant does not contend that there was any fraud, error or mistake in the making of the account stated; its defense is that no account had in fact been stated as between itself and the plaintiff; that the debt was in fact due plaintiff from the president of the defendant company individually, and that the agreement of defendant to pay the debt was voidable under the Statute of Frauds, and further that the agreement to pay the debt of its individual stockholder was ultra vires the defendant company.

In the affidavit of merits filed by the defendant in the Municipal Court it appears that the defendant denied that it acknowledged the account stated or that it promised to pay the balance shown to be due thereon. Had defendant admitted the stated account relied upon by plaintiff, and had it in its affidavit of merits charged that the indebtedness claimed was incurred by another and that its

balance was admitted at the trial to support the findings of the trial judge.

It is contended that the balance, president and treasurer of the defendant company, could not bind their corporation by accepting or agreeing to the account stated. We do not agree with this contention. The plaintiff claimed that a balance was due it from the defendant for merchandise sold and delivered; it admitted to defendant a statement of its claim, and the defendant, by its proper officers, agreed in effect, according to the testimony of plaintiff's witnesses, that the statement was correct. "Appellee's suit was upon an account stated, and upon nothing else. If there were no stating of an account, then appellee had no case. * * *

The president and secretary of appellant are presumed to have authority to make and render the statement in question."

Pick & Co. v. Slimmer, 70 Ill. App. 358.

The defendant does not contend that there was any fraud, error or mistake in the making of the account stated; its defense is that no account had in fact been stated as between itself and the plaintiff; that the debt was in fact due plaintiff from the president of the defendant company individually, and that the agreement of defendant to pay the debt was voidable under the Statute of Frauds, and further that the agreement to pay the debt of its individual stockholder was not valid against the defendant company.

In the affidavit of merits filed by the defendant in the Municipal Court it appears that the defendant admitted that it acknowledged the account stated or that it promised to pay the balance shown to be due thereon. Had defendant admitted the stated account relied upon by plaintiff, and had it in its affidavit of merits charged that the indebtedness claimed was incurred by another and that its

promise to pay the obligation was void for the reasons urged by it, a more serious question would be presented. The defense of the Statute of Frauds and that the promise of defendant was ultra vires that corporation comes too late; these defenses should have been specifically set up in the affidavit of merits. The affidavit of merits charges that "he is informed and believes that some amount of money may be due * * * by one Alexander Neiman to the plaintiff and that plaintiff has attempted to saddle said indebtedness upon this defendant corporation. * * * that said corporation could not under the law assume to pay an obligation of an individual," etc. This is not by any means a claim that the indebtedness sued on was that of another, or that defendant had entered into a voidable agreement to pay such indebtedness. The propositions of law should have been tendered before the announcement of final judgment.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

proposed to pay the obligation as void for the reasons urged
by it, a serious question would be presented. The ne-
cessity of the estate of Vanda and the promise of de-
fendant was inter vivos and the obligation comes too late;
these defenses should have been specifically set up in the
affidavit of defense. The affidavit of defense states that
"he is informed and believes that some amount of money may
be due * * * by one Alexander Leiman to the plaintiff
and that plaintiff has attempted to receive said indebtedness
from this defendant corporation. * * * that said corpo-
ration could not under the law assume to pay an obligation of
an individual," etc. This is not by any means a claim that
the indebtedness arose on a list of accounts, or that de-
fendant had entered into a voidable agreement to pay such
indebtedness. The proposition of law should have been con-
sidered before the announcement of final judgment.
Finding no reversible error in the record, the
judgment will be affirmed.

APPROVED:

CHARLES W. GILLETT,
Plaintiff in Error.

vs.

ELIZABETH PARKER BRYANT,
formerly Elizabeth Parker
Gillett,
Defendant in Error.

2470
203 I.A. 322

ERROR TO THE CIRCUIT

COURT OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The parties to this review were husband and wife. They were divorced by decree entered May 28, 1912. The hearing was on bill of the wife charging habitual drunkenness of the husband, who answered denying the drunkenness charged, to which answer a replication was filed. The decree found the husband guilty of the drunkenness charged, and that he was an unfit person to have the care, custody, control and education of the two children of the marriage, Charles W. Gillett, Jr., and Elizabeth Gillett, who at the time of the entry of the decree were respectively seven and four years of age, and their custody, nurture and education were by the decree awarded to the mother, without any interference on the part of the husband, until the further order of the court. The alimony of the wife and her solicitor's fees were settled by the payment of a lump sum, presumably by agreement of the parties, as the record is silent as to any contest on this phase of the litigation. In accord with the decree the children resided with their mother for a little more than a year after the divorce, when on May 31, 1913, she married Harold J. Bryant, a British subject, since which event the children have lived with their mother and her present husband at Lake Forest in this State.

2031.A.322

KNOW TO THE COURT

THAT THE COURT

CHARLES W. OLLIFF,
Plaintiff in Error,

vs.

ELIZABETH BARNES BRYANT,
formerly Elizabeth Bryant
Olliff,
Defendant in Error.

MR. JUSTICE WALKER delivered the opinion of the court.

The parties to this review were husband and

wife. They were divorced by decree entered May 28, 1912.

The hearing was on bill of the wife charging husband

drunkenness of the husband, she answered denying the
drunkenness charged, so that there was a recrossion was

taken. The decree found the husband guilty of the

drunkenness charged, and that he was an unfit person to
have the care, custody, control and education of the two

children of the marriage, Charles W. Olliff, Jr., and

Elizabeth Olliff, who at the time of the entry of the

decree were respectively seven and four years of age,
and their custody, nurture and education were by the de-

crete awarded to the mother, without any interference on

the part of the husband, until the further order of

the court. The alimony of the wife was not awarded.

There were settled by the payment of a lump sum, previously
by agreement of the parties, no bar record is shown as to

any contest on this issue of the litigation. In regard with

the decree the children resided with their mother for a lit-

tle more than a year after the divorce, when on May 21, 1913,

she married Harold J. Bryant, a British subject, since which

even the children have lived with their mother and her present

husband at Lake Forest in this state.

On December 28, 1915, the defendant in the divorce suit, pursuant to notice dated October 13, 1915, filed his petition praying that that part of the decree providing for the care and custody of the children be changed from their mother to himself. This petition was not filed until the hearing had been entered upon before the Chancellor in open court. Thereafter by leave of court Mrs. Bryant filed her answer to the petition nunc pro tunc as of the date when the petition was filed. On January 13, 1916, after an extended hearing before the Chancellor, a decree was entered denying the prayer of the petition, but so modifying the divorce decree as to give the petitioner the right to visit his children and to talk to and be with them once in each week free from the interference or espionage of their mother or her agents or servants or any one acting in her behalf, and under such conditions as would afford petitioner an untrammelled opportunity to gain the love and affection of the children, and specifying Saturdays in each week between the hours of twelve o'clock noon and six o'clock in the evening as the time in which he might take the children with him from the place of meeting without the interference of any one; and further provided that the children should be personally delivered at twelve o'clock on each Saturday to petitioner at the Deer Path Inn in the city of Lake Forest, to which place petitioner should return them at six o'clock of the same day. Ample and liberal provisions were made to meet such contingencies as sickness of the children and their absence with their mother on their vacations, failure of petitioner to call for them at the appointed time, etc. The decree further recites "that it is advisable for the present that

On December 28, 1915, the defendant in the divorce suit, pursuant to notice dated October 13, 1915, filed his petition praying that part of the decree providing for the care and custody of the children be changed from their mother to himself. This petition was not filed until the hearing had been entered upon before the Chancellor in open court. Thereafter by leave of court Mrs. Bryant filed her answer to the petition and by leave of the court when the petition was filed. On January 13, 1916, after an extended hearing before the Chancellor, a decree was entered denying the prayer of the petition, but so modifying the divorce decree as to give the petitioner the right to visit his children and to talk to and be with them once in each week free from the interference or annoyance of their mother or her agents or servants or any one acting in her behalf, and under such conditions as would afford petitioner an uninterrupted opportunity to gain the love and affection of the children, and specifying Saturdays in each week between the hours of twelve o'clock noon and six o'clock in the evening as the time in which he might take the children with him from the place of meeting without the interference of any one; and further provided that the children should be personally delivered at twelve o'clock on each Saturday to petitioner at the Deer Path Inn in the city of Lake Forest, to which place petitioner should return them at six o'clock of the same day. Ample and liberal provisions were made to meet such contingencies as absence of the children and their mother with their mother on their vacations, illness of petitioner to call for them at the appointed time, etc. The decree further recites "that it is advisable for the present that

the petitioner be given charge and control of said children only during the periods hereinafter specified, with the intent, however, that as soon as the petitioner and said children shall have become better reaccustomed to each other the petitioner may, upon a showing to the court of proper home surroundings for said children, be given the right at certain times to have charge and control of said children at night as well as during the day, provided the education of said children is not thereby interfered with." The decree also directed that the children should be known by their father's name and not by the name of Bryant, which since their mother's remarriage she had adopted for them. The decree gave to petitioner the right to apply to the court for further order and direction in the premises. Petitioner being dissatisfied with the decree prosecutes this writ of error. The parties will hereinafter be referred to respectively as petitioner and respondent.

There is much scandalous matter in this record which it is unnecessary for this court to repeat in order to arrive at an understanding of the cause and a determination of the rights of the parties. We shall therefore refrain from so doing in the interest of decency and particularly of the children of the contestants.

Two questions are in our judgment of conclusive importance in this proceeding. First, the welfare and the best interests of the children of the parties; and, second, whether the learned Chancellor has abused that judicial discretion which the law reposes in a chancellor in this class of cases.

As a general rule children of tender years - as are the children of the parties to this controversy - will not be taken from the custody of their mother where such

the petitioner be given charge and control of said children only during the periods hereinafter specified, with the intent, however, that as soon as the petitioner and said children shall have been fully reconciled to each other the petitioner may, upon a showing to the court of proper reasons for such children, be given the right to have certain cases to have charge and control of said children at night as well as during the day, provided the education of said children is not thereby interfered with. The decree also directed that the children should be known by their father's name and not by the name of Bryant, which since said mother's marriage has been adopted for them. The decree gave to petitioner the right to apply to the court for further order and direction in the premises. Petitioner being dissatisfied with the decree presented this writ of error. The parties will hereinafter be referred to respectively as petitioner and respondent. There is much substantial matter in this record which it is unnecessary for this court to repeat in order to arrive at an understanding of the cause and a determination of the rights of the parties. We shall therefore refrain from so doing in the interest of economy and brevity of the children of the contestants. The questions are in our judgment of relative importance in this proceeding. First, the rights and the best interests of the children of the parties; and second, whether the learned Chancellor has abused his judicial discretion which the law requires in a chancellor in such cases of equity. As a general rule children of such parents - and the children of the parties to this controversy - will not be taken from the custody of their mother where such

mother is physically, morally and by general environment a proper person for them to live with and be controlled by. The evidence in the record abundantly demonstrates that respondent is a proper person to have the care and custody of her children, and that it is for the best interests and welfare of the children that they remain in her custody and subject to her control. Petitioner is, we think, disqualified by his own conduct from having the exclusive charge and control of his children. Notwithstanding the fact that he has been weaned from his former drunken habits and is now a sober, temperate man - which the decree before us in terms finds - the fact remains that for more than three years the petitioner made no attempt to see his children, but abided by the decree in this regard, and that during that time he did not in fact see either of them. At their tender years it would not be unnatural if so long an absence had worked forgetfulness of their father in their immature memories. The love of children for parents is not inherent; it is acquired and comes by cultivation, thoughtfulness, and kindly acts of tenderness day by day in their nurture and bringing up; these are the things which engender love of the child for its parents. Constant agreeable association of parents and children inspires love and affection, while absence and neglect beget forgetfulness and kill love and affection which may formerly have existed. Looking to the best interests of these children and their care and nurture, it was, in the circumstances appearing in this record, but the exercise of sound, humane, judicial discretion in the Chancellor to allow the mother to retain their custody. The record is replete with the testimony of well known personages that the children have a mother's care in the most

mother is physically, morally and by general environment a proper person for them to live with and be controlled by.

The evidence in the record abundantly demonstrates that respondent is a proper person to have the care and custody of her children, and that it is for the best interests and welfare of the children that they remain in her custody

and subject to her control. Petitioner is, we think, disqualified by his own conduct from having the exclusive

charge and control of his children. Understanding the fact that he has been warned from his former drunken habits and is now a sober, law-abiding man - which the decree before

us in terms finds - the fact remains that for more than

three years the petitioner made no attempt to see his children, but abided by the decree in this regard, and that during that time he did not in fact see either of them. At

their tender years it would not be surprising if so long an absence had worked forgetfulness of their father in their immature memories. The love of children for parents is not in-

herent; it is acquired and comes by cultivation, familiarity, and kindly acts of tenderness day by day in their nurture and

bringing up; these are the things which engender love of the child for its parents. Constant aggressive association of parents and children inspires love and affection, while absence and neglect breed forgetfulness and kill love and affection which may formerly have existed. Looking to the

best interests of these children and their care and nurture, it was, in the circumstances appearing in this record, that the exercise of sound, sane, judicial discretion in the

Chancellor to allow the mother to retain their custody. The record is replete with the fact of well known per-

sonages that the children have a mother's care in the best

approved and ethical way; that they are carefully nurtured, that their health and their morals and their intellectual training are carefully looked after and supervised; that they are environed by refining influences, living in a home of culture, and that Mr. Bryant is a man of means and refinement, and is attached to and fond of the children, and that his influence over them is for their good.

It is clear from the record that to change the custody of the children from the mother to the father would be a great injustice to them. Notwithstanding the fact that petitioner's mother, a most estimable and capable woman, is willing and has agreed to take charge of the children and to assist petitioner in their care, nurture and education, it would be contrary to their interests and welfare to change their custody at this time even in these promising conditions. All things being equal as between the mother and the grandmother, the mother has the preference in law in the matter of the custody and nurture of her children.

The fact that respondent's husband is a British subject and that by her marriage her political status follows that of her husband, will not while the parties live within the jurisdiction of the court affect the right of the mother to the custody of the children where it is for their best interests that they remain in her custody. The children are American citizens notwithstanding the status of their mother as to her citizenship, and they will necessarily so remain and be subject to the jurisdiction of the court and from time to time to its further order concerning their custody, as their welfare may demand. Draper v. Draper, 68 Ill. 17.

It is complained that the children are being estranged from their father. We find no evidence in the

enjoyed and ethical way; that they are carefully nurtured, that their health and their morals and their intellectual training are carefully looked after and encouraged; that they are surrounded by refining influences, living in a home of culture, and that Mr. Bryant is a man of means and refinement, and is entitled to and holds of the children, and that his influence over them is for their good.

It is clear from the record that to change the custody of the children from the mother to the father would be a great injustice to them. Notwithstanding the fact that petitioner's mother, a most estimable and capable woman, is willing and has agreed to take charge of the children and to assist petitioner in their care, nurture and education, it would be contrary to their interests and welfare to change their custody at this time even in these peculiar conditions. All things being equal as between the mother and the grandmother, the mother has the preference in law in the matter of the custody and nurture of her children.

The fact that respondent's husband is a British subject and that by her marriage her political status follows that of her husband, will not while the parties live within the jurisdiction of the court affect the right of the mother to the custody of the children where it is for their best interests that they remain in her custody. The children are American citizens notwithstanding the status of their mother as to her citizenship, and they will necessarily so remain and be subject to the jurisdiction of the court and from time to time to the further order concerning their custody, as their welfare may demand. Bryant v. Bryant, 22 Ill. 17. It is concluded that the children are being

record on which to found such complaint. The incident of the boy thinking his father stole his pony is not to be marveled at considering the facts and the boy's youth. Petitioner kept polo ponies one of which the boy rode. When the parents separated the father kept the ponies and the boy was without one. Childlike he missed the pleasure the pony afforded him and in his innocence attributed the deprivation to his father, - a most natural conclusion from conditions evident to the boy's immature mind. The incident of the destruction of his mother's picture by his father had also made an indelible impression upon the boy's mind; but these incidents furnish no evidence of an attempt on the part of respondent to estrange the boy from his father. The fact that he had forgotten his grandmother Gillette is not at all to be wondered at when it is borne in mind that the boy had not seen her for years.

While it is true that respondent has been allowed to take the children out of the jurisdiction of the court into the state of Florida, where respondent's husband has possessions, such absence from this jurisdiction has been temporary only and is so understood by all of the parties concerned. At these times the children remained with respondent and her husband as a family in the same way as when they are in Mr. Bryant's Lake Forest home. Petitioner has made no representation to the Circuit Court of any anticipated danger of the children being permanently taken from the jurisdiction of the court. When such danger exists it will be time, when the court is moved in the matter, to enter an order which shall operate to prevent the children from being taken away from the state of their birth and the country of which they are citizens.

record on which to found such complaint. The incident of
the boy thinking his father stole his pony is not to be
involved in consideration of the facts of this case.
Petitioner kept both ponies one of which the boy rode.
When the parents separated the father kept the ponies and
the boy was without one. Childlike he missed the pleasure
the pony afforded him and in his innocence attributed the
deprivation to his father, - a most natural conclusion from
conditions evident to the boy's immature mind. The incident
of the destruction of his mother's picture by his father had
also made an indelible impression upon the boy's mind; but
these incidents furnish no evidence of an attempt on the
part of respondent to entrap the boy in the act. The
fact that he had forgotten his pony when it disappeared is not
sufficient to be weighed at when it is borne in mind that the
boy had not seen her for years.
This is true that respondent has been allowed
to take the children out of the jurisdiction of the court
into the state of Florida, where respondent's husband has
possessions, such as those from this jurisdiction has been
temporary only and in so and without all of the parties con-
cerned. At these times the children remained with respondent
and her husband as a family in the same way as when they are
in St. Vincent's Lake Forest home. Petitioner has made no
representation to the Circuit Court of any anticipated danger
of the children being permanently taken from the jurisdiction
of the court. When such danger exists it will be time, when
the court is moved in the matter, to order an order which
shall operate to prevent the children from being taken away
from the state of their birth and the custody of which they
are citizens.

There is nothing in the decree from which this court can hold that the Chancellor did not exercise the judicial discretion reposed in him under section 12, chapter 40, R. S., in a reasonable way and in accord with the situation which confronted him. Nor are we able to say that such discretion is abused by any of the terms of the decree. The rights of the parties and of the children have, we think, been properly conserved by the decree, and under the statute as well as the terms of the decree either of the parties is at liberty to apply to the court for such orders as under any changed conditions which may arise may be deemed necessary.

The jurisdiction of the court continues in all matters touching the custody and control of the children. In this regard the children are the wards of the court, and the respondent is amenable to the future orders and directions of the court in relation to them.

We have given due consideration to the rulings of the Chancellor upon the proofs and particularly upon the evidence proffered by petitioner and excluded, and find such rulings are not subject to the objections thereto argued by counsel for petitioner and that in such rulings there is no reversible error.

The decree of the Circuit Court does justice between the parties and the children, the subject matter of the controversy, and is therefore affirmed.

AFFIRMED.

There is nothing in the facts from which this court can hold that the Chancellor did not exercise the judicial discretion reserved in his order section 1, Chapter 10, § 1, in a reasonable way and in accord with the situation which confronted him. Nor are we able to say that such discretion is abused by any of the terms of the decree. The rights of the parties and of the children have, we think, been properly conserved by the decree, and under the statute as well as the terms of the decree either of the parties is at liberty to apply to the court for such orders as under any changed conditions which may arise may be deemed necessary.

The jurisdiction of the court continues in all matters touching the custody and control of the children. In this regard the children are the wards of the court, and the respondent is amenable to the future orders and directions of the court in relation to them.

We have given our consideration to the rulings of the Chancellor upon the proofs and particularly upon the evidence proffered by petitioner and ex parte, and find such rulings are not subject to the objections hereto urged by counsel for petitioner and that in such rulings there is no reversible error.

The decree of the Circuit Court over the parties between the parties and the children, the subject matter of the controversy, and is therefore affirmed.

REVEREND.

PEOPLE OF THE STATE OF
ILLINOIS ex rel. EMMA
L. PARKER,
Plaintiff in Error,

vs.

MRS. WILLIAM BRYSON,
Defendant in Error.

203 I.A. 325

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a habeas corpus proceeding involving the custody of a female child. The relatrix ^{was} ~~is~~ the mother of the child, and the respondent, who has had the custody of the child from the day of its birth, claims ^{it} ~~the~~ child as her own by a sort of prescriptive right based on possession and the alleged abandonment by the mother. There ^{had} ~~have~~ been no adoption proceedings instituted at any time. There ~~is~~ ^{is} ~~was~~ no legal tie that ^{bound} ~~binds~~ the respondent to the child and no contractual relation, either express or implied, between the mother and the respondent affecting the custody and disposition of the child. There ^{is} ~~is~~ no existing contract by which respondent could be compelled against her will to retain the custody of the child and to support and care for her. When respondent received the child she knew not from whence she came. She had not seen the mother; neither did she ever at any time seek her or attempt to obtain any ratification of this action by either the mother or any person having any legal right to the child or bearing any relationship to her. ^{she}

That respondent has taken excellent care of the child and provided for her to the best of her ability and in accord with her means and the station in life in which

208 I.A. 325

ORDER TO RETURN CHILD
OF COON COUNTY.

IN THE COURT OF THE STATE OF
ILLINOIS IN AND FOR THE COUNTY OF
COON, I, JUDGE, do hereby certify that
the following is a true and correct
copy of the original as the same
appears in the records of the Court.

THE JUDGE HEREBY DELIVERED THE ORDER OF THE COURT.

This is a proper order proceeding involving
the custody of a female child. The relation to the mother
of the child, and the respondent, who has had the custody
of the child from the day of its birth, claims the child as
her own by a sort of prescriptive right based on possession
and the alleged abandonment by the mother. There have been
no adoption proceedings instituted at any time. There is
no legal title in the respondent to the child and no
contractual relation, either express or implied, between
the mother and the respondent affecting the custody and
disposition of the child. There is no existing contract by
which respondent could be compelled against her will to
retain the custody of the child and to support and care for
her. When respondent received the child she knew not from
whence she came. She had not seen the mother; neither did
she ever at any time seek her or attempt to obtain any
ratification of this action by either the mother or any
person having any legal right in the child or bearing any
relationship to her.

That respondent has taken excellent care of the
child and provided for her to the best of her ability and
in accord with her means and the station in life in which

she moves, and that she has much maternal affection for the child must be conceded. That it may be a hardship for respondent to part with the child and that so to do will bring anguish to her heart are no sufficient reasons for overriding the law and disregarding the superior natural rights of the mother, unless, in so doing, the welfare of the child will be affected to her detriment.

The rights of respondent primarily rest in the solution of the question as to whether relatrix, the mother of the child, intentionally abandoned her when she, on the day of her birth, allowed her to be taken from her. If there was no such abandonment, then the claims of respondent fail, unless it can be said that relatrix is an unfit person to have the custody of the child or that the welfare of the child will be best served by leaving her with respondent. In deciding the question of abandonment, the intention of the mother at the time of the surrender is the principal factor. Such intention must be gathered from the situation of the relatrix and all the attendant circumstances and conditions.

~~At the inception of Relatrix's troubled her~~
~~situation was tragic. She had been deceived by her lover,~~
~~Dr. Parker. She had indiscreetly yielded to his embraces,~~
~~relying upon his promise to marry her and, inferentially,~~
~~to care for her in any situation in which she might find~~
~~herself as the result of her imprudent conduct with him.~~
~~When she discovered she was pregnant she kept her counsel and~~
~~confided in no one but the man responsible for her trouble.~~
~~Dr. Parker was a man of mature years, but not brave; he was~~
~~willing to let all the pain and anguish of mind rest upon~~
~~the woman he had betrayed. At the time of the love making~~

the mother, and that she has a natural affection for the child and that it may be a hardship for her to be separated from the child and that so as to all bring anguish to her heart are no sufficient reasons for overriding the law and disregarding the superior natural rights of the mother, unless, in so doing, the welfare of the child will be affected to her detriment.

The rights of respondent primitively rest in the solution of the question as to whether respondent, the mother of the child, intentionally abandoned her when she, on the day of her birth, allowed her to be taken from her. If there was no such abandonment, then the claims of respondent fail, unless it can be said that respondent is an unfit person to have the custody of the child or that the welfare of the child will be best served by leaving her with respondent. In deciding the question of abandonment, the intention of the mother at the time of the surrender is the principal factor. Such intention must be gathered from the situation of the respondent and all the attendant circumstances and conditions.

At the inception of respondent's trouble her situation was tragic. She had been deceived by her lover, Dr. Barker, she had indirectly yielded to his advances, relying upon his promise to marry her and, unfortunately, to care for her in any situation in which she might find herself as the result of her imprudent conduct with him. When she discovered she was pregnant she kept her counsel and confided in no one but the man responsible for her trouble. Dr. Barker was a man of mature years, but not grave; he was willing to let all the pain and anguish of mind rest upon the woman he had betrayed. At the time of the love making

relatrix was employed in the household of Dr. Parker in Vermont, Illinois. That household consisted of himself and his mother, a selfish old lady upwards of eighty years of age, who had procured Dr. Parker to promise that he would not marry during her lifetime. To save a scandal in the little country town of Vermont, Dr. Parker packed relatrix away to Chicago, giving her money and a letter to a Dr. Bacon of Chicago and the Polyclinic hospital. All that thereafter transpired concerning the birth of her baby and its being sent to respondent was under the direction of Dr. Bacon, acting for Dr. Parker, to all of which relatrix was a passive, yielding, uncontentious victim.

Parker, in fulfilment of his promise, legitimized his unborn infant by secretly marrying relatrix at Milwaukee, Wisconsin. Barring the time when Dr. Parker and relatrix were with each other at the time of their secret marriage and his departure from Chicago after that event to his home in Vermont, relatrix did not again see her husband. She was left to shift for herself as best she might under the directions of Dr. Bacon, acting for her husband. She had promised to keep their secret, and as matter of fact she told no one of her condition and plight, not even her own father.

When the pangs of maternity came she was alone in her anguish. Dr. Bacon at the Polyclinic hospital directed affairs, not at the request of relatrix but at the direction of Dr. Parker, which fact was unknown to relatrix and never communicated to her by her husband, Dr. Bacon or anyone else. Her baby was, under the direction of Dr. Bacon, acting in collaboration with Dr. D. A. K. Steele of Chicago, taken from her and was without relatrix having been

relative was employed in the household of Dr. Barker in
Vermont, Illinois. That household consisted of himself and
his mother, a selfish old lady who was of slight years of
age, and had married Dr. Barker to provide that he would not
starve in his old age. To save a scandal in the little
country town of Vermont, Dr. Barker decided relative very to
Chicago, giving her money and a letter to a Dr. Bacon of
Chicago and the Holy Family Hospital. All time thereafter
transpired concerning the birth of her baby and its being
sent to respondent was under the direction of Dr. Bacon,
acting for Dr. Barker, to all of which relative was a pas-
sive, yielding, unscrupulous victim.
Later, in fulfillment of his promise, relative
told his unborn infant by secretly marrying relative at
Milwaukee, Wisconsin. During the time when Dr. Barker
and relative were with each other at the time of their secret
marriage and his departure from Chicago after that event to
his home in Vermont, relative did not speak her mother's
name and left to shift for herself as best she might under
the direction of Dr. Bacon, acting for her husband. She
had promised to keep their secret, and as matter of fact
she told no one of her conception and birth, not even her
own father.
When the baby of maternity case was born alone
in her mother's Dr. Bacon at the Holy Family Hospital at
Vermont, Illinois, not at the request of relative but at the
direction of Dr. Barker, which fact was known to relative
and never communicated to her by her husband, Dr. Bacon or
anyone else. Her baby was, under the direction of Dr. Ba-
con, acting in collaboration with Dr. A. E. Bacon of
Chicago, taken from her and was without relative having been

told at the time the baby's destination, delivered to respondent at the University hospital, where she held out to her friends that she had been delivered of relatrix's baby, although she was at the time, by reason of surgical operations, incapable of bearing a child.

Dr. Bacon was acting for Dr. Parker in an attempt to conceal from his family and friends the undisputed fact that he was the father of relatrix's baby. Bacon was a partisan. He was acting for Dr. Parker; he was callous to the rights or feelings of relatrix; he was cold-bloodedly serving his friend. In the light of all the facts we cannot say that relatrix consciously abandoned her baby. While, before her pains of maternity had scarcely ceased, she allowed her baby to be taken from her under a secret arrangement between her husband and Dr. Bacon, to which she passively assented, this did not constitute conscious abandonment of her child. She says she expected in time that her husband would take her and her baby home. What was more natural for her to expect? To do so was Dr. Parker's moral and paternal duty. With the shame of concealment of the birth of her legitimate child resting upon her and the neglect at this trying time of her husband, who should have been with her to sustain and comfort her in her distress, she was in no condition to decide (if she had been free to do so, which she was not) about the child's disposition. Dr. Parker was guilty of abandonment of the child, but not so his wife. Her subsequent conduct demonstrates that she wanted to ascertain who had her child and where the child was. Dr. Bacon refused information when interrogated upon the subject, and there was no other person to aid her. There were many things which she could have done and proceedings which she could have instituted, but she evidently had neither the

told at the time the baby's destination, delivered to respon-
dent at the University hospital, where she held out to her
friends that she had been delivered of Relatix's baby,
although she was at the time, by reason of surgical opera-
tion, incapable of bearing a child.

Dr. Bacon was acting for Dr. Barker in an at-
tempt to conceal from his family and friends the unadmitted
fact that he was the father of Relatix's baby. Bacon was a
portisan. He was acting for Dr. Barker; he was willing to
the rights or feelings of Relatix; he was cold-bloodedly
serving his friend. In the light of all the facts we cannot
say that Relatix consciously abandoned her baby. While,
before her pains of maternity had scarcely ceased, she allowed
her baby to be taken from her under a secret arrangement for-
teen her husband and Dr. Bacon, to which she previously as-
sented, this did not constitute conscious abandonment of her
child. She says she expected in time that her husband would
take her and her baby home. What was more natural for her
to expect. To do so was Dr. Barker's moral and paternal
duty. With the chance of concealment of the birth of her
legitimate child resting upon her and the neglect of this
trying time of her husband, who should have been with her
to sustain and comfort her in her distress, she was in no
condition to decide (if she had been free to do so, which
she was not) about the child's disposition. Dr. Barker
was guilty of abandonment of the child, but not so his
wife. Her subsequent conduct demonstrates that she wanted
to ascertain who had her child and where the child was. Dr.
Bacon refused information when interrogated upon the subject,
and there was no other person to aid her. There were many
things which she could have done and proceedings which she
could have instituted, but she evidently had neither the

courage nor the ability to proceed with them. She was dominated by the wish of her husband and ruled by the conduct of Dr. Bacon.

Dr. Parker's mother died before the birth of the child and yet he did not change his attitude, which he readily might have done, but continued to leave relatrix to her own resources to preserve the secret of her approaching maternity. It was only when Dr. Parker died that the facts of his relationship with relatrix and the birth of their child became known, and through a search for the child as heir of her father the child's whereabouts were discovered. Immediately upon relatrix discovering her child with the respondent she demanded the child, and failing to obtain it instituted this proceeding. She acted promptly in demanding her right to the child as soon as she discovered that she was with respondent. Laches is therefore not attributable to her. We therefore hold that neither in fact nor in law has relatrix abandoned her child. The findings of the trial Judge against relatrix are not only not sustained by the proofs, but are contrary to such proofs and their manifest weight.

Two other points remain for disposition, viz:

1. The fitness of relatrix to have the custody of her child.

2. The welfare of the child.

First, the mother, the father, as in this case, being dead, is the natural guardian and custodian of her own child, and her rights will not be infringed or curtailed unless there is something in her life and conduct which makes her an undesirable character to be entrusted with the care and nurture of her child. This record not only fails to

...nor the ability to proceed with the ... she was domi-
nated by the wish of her husband and ruled by the conduct of
Mr. Bacon.

Dr. Barker's mother died before the birth of the

child and yet he did not change his attitude, which he
readily might have done, but continued to leave relative to
her own weakness to preserve the secret of her approaching
maternity. It was only when Dr. Barker died that the facts
of his relationship with relative and the birth of their
child became known, and through a search for the child as
heir of her father the child's whereabouts were discovered.

Immediately upon relative discovering her child with the
respondent she demanded the child, and failing to obtain it
instituted this proceeding. She acted promptly in demanding
her right to the child as soon as she discovered that she
was with respondent. Lawes is therefore not attributable
to her. He therefore holds that neither is fact nor in law
has relative abandoned her child. The findings of the trial
jurors against relative are not only not sustained by the
proofs, but are contrary to such proofs and their weight
weight.

Two other points remain for disposition, viz:

1. The fitness of relative to have the custody
of her child.

2. The welfare of the child.

First, as to the latter, the latter, as in this case,
being dead, is the natural guardian and custodian of her own
child, and her rights will not be infringed or curtailed un-
less there is something in her life and conduct which shows
her an undesirable character to be entrusted with the care
and nurture of her child. This record not only fails to

establish anything derogatory to the character of relatrix, but all the evidence on that subject demonstrates that she is of excellent character; that she is a woman of ^{education,} refinement and of exemplary conduct, and that the only criticism upon her life or character possible to be indulged are the acts which culminated in the dilemma in which she found herself in indiscreetly yielding herself to the author of her troubles. We therefore hold that she is a fit person to have the care, custody and nurture of her child.

Second - the welfare of the child. Surely it cannot be gainsaid that, all other things being equal, it is for the best welfare of a child to be brought up by its own mother rather than to be reared by a foster mother, however good and circumspect such foster mother may be.

Let us view for a moment the temporal and social side of these two women who are contending for the mothering of relatrix's child. The record fails to disclose any Mr. Bryson, so we will assume that Mrs. Bryson is a husbandless woman. Mrs. Bryson testified that she is employed by the telephone company from 5:30 to 9:30 in the evening; that in addition to her wages she has a house from which she receives ten dollars a month as rent for "downstairs" and that she lives "upstairs." What she does with the baby while she is at work she did not explain in her testimony, but her witness, Mrs. Weber, testified that when respondent is not at home her mother takes care of the baby. Respondent's stepfather testified that she works nights, goes to work about five o'clock or four o'clock and works until nine, sometimes ten. The baby is in his store from four until ten. On the other hand, the mother of the child has a little money and a home for the child on her father's farm, where she can give the child her maternal and undivided attention and care

establish anything derogatory to the character of Relativity, but all the evidence on that subject demonstrates that she is of excellent character; that she is a woman of refinement and education, of exemplary conduct, and that the only criticism upon her life or character possible to be indulged are the acts which culminated in the dilemma in which she found herself in indiscreetly yielding herself to the author of her troubles. We therefore hold that she is a fit person to have the care, custody and nurture of her child.

Second - the welfare of the child. Unverf is

cannot be gainsaid that, all other things being equal, it is for the best welfare of a child to be brought up by its own mother rather than to be reared by a foster mother, however good and circumstanced such foster mother may be. Let us view for a moment the temporal and

social side of these two women who are contending for the mothering of Relativity's child. The record fails to disclose any Mr. Bryson, so we will assume that Mrs. Bryson is a penniless woman. Mrs. Bryson testified that she is employed by the telephone company from 8:30 to 9:30 in the evening; that in addition to her wages she has a house from which she receives ten dollars a month as rent for "dormitories" and that she lives "upstate." What she does with the day while she is at work she did not explain in her testimony, but her witness, Mrs. Weber, testified that when respondent is not at home her mother takes care of the baby. Respondent's stepfather testified that she works nights, goes to work about five o'clock or four o'clock and works until nine, sometimes ten. The baby is in his store from four until ten. On the other hand, the mother of the child has a little money and a home for the child on her father's farm, where she can give the child her maternal and undivided attention and care

and rear the child in the atmosphere of a healthy country environment. The child will have with her mother the protection of her mother's father and the care which the grandfather will naturally extend to his granddaughter; she will have the advantage of a family life and be environed with her natural kin and with a mother's care, undisturbed by daily attention to telephonic duties. We think it clear that it is decidedly to the welfare and best interests of the child that she be brought up and cared for by her mother and that the social, moral, physical and educational training of the child will be best promoted by awarding her to her own mother.

It is argued by counsel for respondent that relatrix's conduct is not actuated by affection for her child, but by a sordid desire to obtain the little insurance money due the child under a policy on her father's life. The facts as well as the acts of relatrix refute this aspersion. It is alleged and not denied that relatrix has borne the expense of this protracted and costly litigation, which must of necessity largely exceed the child's insurance money; and, furthermore, it is not challenged but that relatrix, as guardian of her child, has collected such insurance and invested the same under the direction and with the approval of the Probate Court of Cook County. This insinuation against relatrix's honesty of purpose falls of its own weight.

This case is before the court for the second time. The law of the case is as announced in an opinion by Mr. Justice Barnes, Gen. No. 21232, with which we are most heartily in accord. This opinion is binding on all the parties, including this court on this review. The proceedings on the second trial but accentuate the view of this court as voiced by the opinion of Mr. Justice Barnes and

and rear the child in the atmosphere of a healthy country environment. The child will have with her mother the protection of her mother's father and the care which the grandmother will naturally extend to his granddaughter; and will have the advantage of a family life and be surrounded with her natural kin and with a mother's care, undisturbed by daily attention to business duties. We think it clear that it is decidedly to the welfare and best interests of the child that she be brought up and cared for by her mother and that the social, moral, physical and educational training of the child will be best promoted by rearing her to her own mother.

It is argued by counsel for respondent that respondent's conduct is not actuated by affection for her child, but by a selfish desire to obtain the little insurance money due the child under a policy on her father's life. The facts as well as the state of respondent's mind are not in dispute and not denied that respondent has borne the expense of this protected and costly litigation, which must of necessity largely exceed the child's insurance money; and, further more, it is not challenged but that respondent, as guardian of her child, has collected such insurance and received the same under the direction and with the approval of the Probate Court of Cook County. This insinuation against respondent's honesty or purpose fails of its own weight.

This case is before the court for the second time. The law of the case is as announced in an opinion by Mr. Justice Barnes, Jan. No. 21232, with which we are most heartily in accord. This opinion is binding on all the parties, including this court on this review. The proposed findings on the second trial but once break the view of this court as voiced by the opinion of Mr. Justice Barnes and

confirm that opinion in every essential particular.

For the reasons above appearing the judgment of the Superior Court is reversed and the cause is remanded to the Superior Court with directions to enter a judgment granting the prayer of the petition for habeas corpus and awarding relatrix her child, now in the custody of respondent and known as "Baby Bryson."

REVERSED AND REMANDED
WITH DIRECTIONS.

confirm that opinion in every essential particular.
For the reasons above appearing the judgment
of the Superior Court is reversed and the case is remanded
to the Superior Court with directions to enter a judgment
granting the prayer of the petition for habeas corpus and
awarding relief as herein called for in the custody of respondent
and known as "Baby Dixon".

REVEREND AND HONORABLE
WITH DIRECTIONS.

170 - 22597

J. E. SLATER,
Plaintiff in Error,

vs.

ELBERT D. BALL,
Defendant in Error.

203 I.A. 332

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended writ of error. The action involves a note for \$451.50, in which defendant was liable as maker. He defended on the ground and claim that the note had been paid by the conveyance of an Indiana farm; that plaintiff agreed to surrender the note canceled to defendant when the conveyance was delivered but through inadvertence, defendant claims, the note was not surrendered, and sometime after the settlement claimed this suit was instituted.

The trial was before the court with a jury. The verdict was in favor of defendant, with which, after overruling motions of plaintiff for a new trial and in arrest of judgment, the trial judge evidenced his agreement by entering a judgment upon the verdict and against plaintiff for costs.

The questions are all of fact. There are no errors of procedure or in rulings upon the evidence which would warrant the trying of the case again. There are no instructions abstracted, and consequently no question arising upon the method or matter about which the jury

203 L.A. 332

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

1. E. SLATER,
Plaintiff in Error,
vs.
ERBERT D. BAILL,
Defendant in Error.

170 - 22227

MR. JUSTICE HOLCOM DELIVERED THE OPINION OF THE COURT.

This is an undefended writ of error. The action involves a note for \$451.50, in which defendant was liable as maker. He defended on the ground and claim that the note had been paid by the conveyance of an Indiana farm; that plaintiff agreed to surrender the note canceled to defendant when the conveyance was delivered but through inadvertence, defendant claims, the note was not surrendered, and sometime after the settlement claimed this suit was instituted.

The trial was before the court with a jury. The verdict was in favor of defendant, with which, after overruling motions of plaintiff for a new trial and in arrest of judgment, the trial judge evidenced his agreement by entering a judgment upon the verdict and against plaintiff for costs.

The questions are all of fact. There are no errors of procedure or in rulings upon the evidence which would warrant the trying of the case again. There are no instructions abated, and consequently no question existing upon the method or matter about which the jury

were instructed, if at all.

The court did not err in denying plaintiff's motion for an instructed verdict. The evidence was sufficiently in conflict to call for the jury's judgment thereon. Whether the conveyance of the Indiana farm was that of a fee or subject to a condition of defeasance is unimportant. Was the conveyance given and received in payment and satisfaction of the note in suit? That is the question. The jury said it was. The trial Judge agreed with the conclusion at which the jury arrived, and so do we. While the burthen of proving payment was upon the defendant, we think he abundantly sustained such burthen by a clear preponderance of the evidence.

As we cannot say that the verdict and judgment are manifestly contrary to the probative force of the evidence, the judgment of the Municipal Court is affirmed.

AFFIRMED.

were answered, it at all.

The court did not err in denying plaintiff's

motion for an instructed verdict. The evidence was conflicting in conflict to call for the jury's judgment thereon.

Whether the conveyance of the Indiana farm was that of a fee or subject to a condition of defeasance is an important

fact the conveyance given and received in payment and satisfaction of the note in suit? That is the question. The

jury said it was. The trial judge agreed with the conclusion at which the jury arrived, and so do we. While the burden

of proving payment was upon the defendant, we think he abundantly sustained such burden by a clear preponderance

of the evidence.

As we cannot say that the verdict and judgment are manifestly contrary to the preclusive force of the evidence, the judgment of the Municipal Court is affirmed.

AFFIRMED.

H. M. FREEMAN,
Appellee,
vs.
J. T. COUNSELL,
Appellant.

203 I.A. 333
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On June 16, 1914, defendant executed and delivered to one P. A. Hines a promissory note with a power of attorney to confess judgment in the sum of \$448.04, the note being payable September 14, 1914. Hines, the payee, was before maturity of the note adjudged bankrupt, and plaintiff is the purchaser of the note through the Hines bankruptcy proceedings. The note not being paid at maturity, judgment thereon was entered by confession July 16, 1915. Defendant was notified of the judgment the day it was entered and subsequently requested to pay it. With actual knowledge of the judgment from the day of its entry, defendant took no steps to open it until September 30, 1915. The petition then filed was denied by the court, but on a further petition of defendant the judgment was opened on October 28, 1915. The court might well have denied all the motions to open the judgment on the ground of laches. Hall v. Jones, 32 Ill. 38.

On a hearing before the court the judgment was reinstated, from which this appeal followed.

Hines and Counsell and one W. H. Smith owned the stock of the Minden Edison Light & Power Company. Hines also owned an unincorporated bank, known as the "Madison Street Bank." The Minden corporation had borrowed \$1225 of the bank, for which the bank held two notes, one for \$1,000 and the other for \$225, dated May 22, 1913, and payable six

2031 A. 333

APPEAL FROM SUPREMACY COURT

OF CHICAGO

H. M. BRIDGES, Appellee,

vs.

J. V. CONNOR, Appellant.

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

On June 16, 1914, defendant executed and delivered to one A. Hines a promissory note with a power of attorney to confess judgment in the sum of \$448.04, the note being payable September 14, 1914. Hines, the payee, was before maturity of the note assigned bankrupt, and plaintiff is the purchaser of the note through the Hines bankruptcy proceeds. The note not being paid at maturity, judgment thereon was entered by confession July 16, 1915. Defendant was notified of the judgment the day it was entered and subsequently requested to pay it. With actual knowledge of the judgment from the day of its entry, defendant took no steps to open it until September 30, 1915. The petition then filed was denied by the court, but on a further petition of defendant the judgment was opened on October 26, 1915. The court on the ground of laches, Hall v. Jones, 32 Ill. 38, might well have denied all the motions to open the judgment on a hearing before the court the judgment was

reinstated, from which this appeal followed. Hines and Connor and one J. A. Smith owned the stock of the Hines Glass Light & Power Company. Hines also owned an unincorporated bank, known as the "Hudson Street Bank." The Hines corporation had borrowed \$125 of the bank, for which the bank held two notes, one for \$100 and the other for \$25, dated May 25, 1915, and payable six

months after date. When the notes matured they were extended for a period of six months, which made them again mature May 22, 1914. On June 12, 1914, the LaSalle Street Trust and Savings Bank failed, and P. A. Hines, the owner of the Madison Street Bank, had all his available funds on deposit in that failed institution and was sorely pressed for funds with which to pay his depositors. Defendant was importuned to pay the notes of the Minden Company due the bank, and finally the matter was compromised by defendant giving his check for \$800 and the note in suit. Hines at the same time assigned twenty-four shares of stock in the Minden Company to defendant. Defendant claims that Hines at the time the note in suit was delivered, and as part of the consideration of the transaction, delivered to him the following agreement:

“I agree to pay to P. A. Hines Four Hundred Forty-eight Dollars and Four Cents (\$448.04), subject to the following conditions:

1. That all matters relating to the Minden Edison Light & Power Company, now handled by P. A. Hines, or relatives, be brought up to date and all collections made and forwarded to me.

2. That no claim for services shall be rendered against the Minden Edison Light & Power Company or me personally by P. A. Hines or relatives, except that of Clara M. Hines already agreed on.

P. A. Hines.”

We are unable to discover from this writing any contractual obligation between Hines and defendant. It is a nudum pactum. It is like a man shaking hands with himself - it is meaningless.

Defendant, however, claims many things for this so-called contract, and he was permitted by the trial Judge to put most of them into the record, but therefrom we are unable to say that they present any defense for the non-payment of the note. Certainly there was no failure of consideration. The consideration was the indebtedness of the Minden Company, of which defendant was the principal stock-

months after date. When the notes matured they were extended for a period of six months, which made them mature May 22, 1914. On June 12, 1914, the Pacific Street Trust and Savings Bank failed, and J. A. Hines, the owner of the bank, had all his available funds on deposit in that failed institution and was sorely pressed for funds with which to pay his depositors. Defendant was informed to pay the notes of the Hines Company and the bank, and finally the matter was carried over to defendant paying his check for \$100 and the note in suit. Hines at the same time assigned twenty-four shares of stock in the Hines Company to defendant. Defendant claims that Hines at the time the note in suit was delivered, and as part of the consideration of the transaction, delivered to him the following agreement:

"I agree to pay to J. A. Hines Ten Dollars (\$10.00) subject to the following conditions:
1. That all matters relating to the Hines Company, Hines Bank, Hines Trust Company, now handled by J. A. Hines or relatives, be brought up to date and all collections made and returned to me.
2. That no claim for services shall be made hereafter against the Hines Bank, Hines Trust Company or Hines Company by J. A. Hines or relatives, except that of J. A. Hines already stated on."

J. A. Hines.
He was unable to discover from this writing any contractual obligation between Hines and defendant. It is a negotiable instrument. It is like a promissory note with itself - it is negotiable.

Defendant, however, claims many things for this so-called contract, and he was permitted by the trial judge to put most of them into the record, but defendant was unable to say that they proved any defense for the non-payment of the note. Defendant claims that in failure of the institution. The consideration was the purchase of the Hines Company, of which defendant was the principal stock-

holder, evidenced by its notes which Hines surrendered to defendant for his \$800 check and the note in suit. There is nothing in this record to show even from defendant's contentious viewpoint that Hines did not substantially perform what is claimed to be the terms of the agreement of June 16, 1914.

The difficulties are of defendant's own making. He insists that the contract is something entirely different from that which its words import. Giving to those words the most liberal construction in defendant's favor, we can not say the evidence shows that Hines did not do all the things in that agreement required of him. There is no evidence that he has any of the assets of the Minden Company or that any of his relatives have any.

This is not like an ordinary action at law. Errors of procedure have been waived, and because the judgment was opened the effect of the stipulations in the power of attorney waiving errors of procedure was in no sense abrogated.

The trial Judge did justice between the parties on the evidence, and upon the case as a whole presented by such evidence. Defendant failed in presenting any meritorious defense. Technical legal defenses are closed to him in this case.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

holder, evidenced by the notes which were submitted to defendant for his own check and the note in suit. There is nothing in this record to show even from defendant's own testimony viewpoint that he did not substantially perform what is claimed to be the terms of the agreement of June 16, 1914.

The affidavits are of defendant's own making. He insists that the contract is something entirely different from that which its words import. Owing to those words the most liberal construction in defendant's favor, we can not say the evidence shows that there did not do all the things in that agreement required of him. There is no evidence that he has any of the assets of the Linde Company or that any of his relatives have any.

This is not like an ordinary action at law. Errors of procedure have been raised, and because the judgment was opened the effect of the stipulations in the power of attorney relating errors of procedure was in no sense approximated.

The trial judge did justice between the parties on the evidence, and upon the case as a whole presented by such evidence. Defendant failed in presenting any substantial defense. Technical legal defenses are closed to him in this case.

The judgment of the principal court is affirmed.

ALFRED.

LOCKWOOD & STRICKLAND COMPANY,
a corporation,
Appellant,

vs.

CITY OF CHICAGO, a municipal
corporation,
Appellee.

203 T.A. 336

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit in which plaintiff seeks to recover from the City of Chicago the sum of \$2,694 paid to it under the terms of an ordinance vacating an alley. Plaintiff, besides the consolidated common counts, filed a special count, in which the ordinance in question is declared upon and set out in haec verba. To this special count defendant interposed a general demurrer, which, being sustained, the suit was dismissed and this appeal followed.

The right to maintain the action rests in the interpretation of the ordinance and the ordinance being before the court in the special count, the court will interpret it and declare its legal purport and effect regardless of the erroneous conclusion of the pleader. The question of the right to maintain the action is one of law for the court, and that right rests in the legal interpretation of the liability of the city to refund the sum paid by plaintiff under the terms of the ordinance. Binz v. Tyler, 79 Ill. 248. The question involved is novel and, we think, one of first impression. No case directly in point has been cited, and an independent search has failed to disclose any. The briefs

80071.336

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

LOCKWOOD & STRICKLAND COMPANY,
a corporation,
Appellant,
vs.
CITY OF CHICAGO, a municipal
corporation,
Appellee.

MR. JUSTICE HOLLOM DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit in which plain-

tiff seeks to recover from the City of Chicago the sum of
\$2,694 paid to it under the terms of an ordinance vacating

an alley. Plaintiff, besides the consolidated common

counts, filed a special count, in which the ordinance in
question is declared upon and set out in lego verba. To this
special count defendant interposed a general demurrer, which,
being sustained, the suit was dismissed and this appeal fol-
lowed.

The right to maintain the action rests in the in-

terpretation of the ordinance and the ordinance being before
the court in the special count, the court will interpret it
and declare its legal purport and effect regardless of the
extraneous conclusion of the pleader. The question of the
right to maintain the action is one of law for the court,
and that right rests in the legal interpretation of the im-
plicity of the city to refund the sum paid by plaintiff under
the terms of the ordinance. Hiss v. Tyler, 70 Ill. 248.

The question involved is novel and, we think, one of first
impression. No case directly in point has been cited, and an
independent search has failed to disclose any. The briefs

of counsel afford but little aid to solve the point involved, and we shall decide the case in accord with our own impression of the force and effect of the ordinance, treating the ordinance as the contract of the parties, in force of which their rights and obligations must be ad-measured.

Plaintiff attempted to set up in the special count the running of the statute of limitations, and it is objected that this pleading is bad because the exceptions which arrest the running of the statute, if any exist, are not in some suitable language negatived. This contention is untenable. If the running of the statute has been arrested in any manner, that is matter of defense and need not be anticipated in the initial pleading. People for use, etc. v. May, 276 Ill. 332. The point cannot be reached by demurrer but must be availed of by plea. Plaintiff seeks to recover the amount paid the city under Sec. 2 of the vacating ordinance, which reads:

"The vacation herein provided for is made upon the express condition that Lookwood & Strickland Company, a corporation, shall, within sixty (60) days after the passage of this ordinance, pay to the City of Chicago the sum of twenty-six hundred ninety-four (2694) dollars toward a fund for the payment of any and all damages which may arise from the vacation of said alley."

The plaintiff avers that it fully complied with the terms of the ordinance and among other things paid the City \$2694 within sixty days after the passage of the ordinance.

The ordinance vacating the alley is a valid ordinance and within the power of the city council to enact. This power carried with it the right to impose reasonable terms as a sine qua non to the ordinance becoming effective. The pay-

of counsel afford but little aid to solve the point involved, and we shall decide the case in accord with our own impression of the force and effect of the ordinance, treating the ordinance as the contract of the parties, in force of which their rights and obligations must be determined.

Plaintiff attempted to set up in the special count the running of the statute of limitations, and it is objected that this pleading is bad because the exceptions which extend the running of the statute, if any exist, are not in some suitable language negatived. This contention is unavailing. If the running of the statute has been arrested in any manner, that is a matter of defense and need not be anticipated in the initial pleading. People for use, etc. v. City of Chicago, 236 Ill. 326. The point cannot be negatived by demurrer but must be availed of by plea. Plaintiff seeks to recover the amount paid the city under sec.

2 of the vesting ordinance, which reads:

"The vesting herein provided for is made upon the express condition that Lockwood & Strickland Company, a corporation, shall, within sixty (60) days after the passage of this ordinance, pay to the City of Chicago the sum of twenty-six hundred ninety-four (\$2694) dollars toward a fund for the payment of any and all damages which may arise from the vacation of said alley."

The plaintiff avers that it fully complied with

the terms of the ordinance and among other things paid the City \$2694 within sixty days after the passage of the ordinance.

The ordinance vesting the alley in a valid ordinance and within the power of the city council to make. This power carried with it the right to impose reasonable terms as a condition to the ordinance becoming effective. The pay-

ment of the money by plaintiff settled the question of the power of the City to exact such payment. The payment being voluntary and not by compulsion, plaintiff is estopped from now questioning the legality of its exaction. There is no question in this case as to whom the vacated land reverted. In no aspect of the case is the court informed as to the status of the vacated land, and no such question is raised by the pleadings. The sole question is, can plaintiff recover back from the city the money which it paid under the ordinance.

It is the fact that the money, by the terms of the ordinance, was paid "toward a fund for the payment of any and all damages which may arise from the vacation of said alley." May this condition be treated by the city as ascertained and liquidated damages between the parties? The odd amount exacted and paid would indicate that some mathematical calculation as to damages had been indulged. Can we say from the language of the ordinance that it was the intention of the parties that there should be any repayment, or that the money was paid simply as security against the city's being thereafter mulcted in damages for vacating the alley? If any such intention prevailed in the minds of the parties, they certainly failed to use any language in the ordinance to so indicate. The ordinance is in a measure like unto a bond of indemnity or bail bond. In contracts of this nature and quality the rights of the parties are controlled by the conditions of the bond. In an agreement of indemnity where money is deposited, the right either to keep or demand a return of the money is regulated by the terms of such agreement, and so we think the terms of the ordinance are regulative of the rights of the parties and

ment of the money by plaintiff settled the question of the power of the city to exact such payment. The payment being voluntary and not by compulsion, plaintiff is estopped from now questioning the legality of its exaction. There is no question in this case as to whom the vacated land reverted.

In no aspect of the case is the court informed as to the status of the vacated land, and no such question is raised by the pleadings. The sole question is, can plaintiff recover back from the city the money which it paid under the ordinance.

It is the fact that the money, by the terms of

the ordinance, was paid "toward a fund for the payment of any and all damages which may arise from the vacation of said alley." May this condition be tested by the city as

ascertained and liquidated damages between the parties? The old account exacted and paid would indicate that some mathematical calculation as to damages had been indulged. Can we say from the language of the ordinance that it was the intention of the parties that there should be any re-

payment, or that the money was paid simply as security against the city's being thereafter entitled in damages for vacating the alley? If any such intention prevailed in the

minds of the parties, they certainly failed to use any language in the ordinance to so indicate. The ordinance is in essence like unto a bond of indemnity or bail bond.

In contracts of this nature and quality the rights of the parties are controlled by the conditions of the bond. In an agreement of indemnity where money is deposited, the right either to keep or demand a return of the money is regulated by the terms of such agreement, and so we think the terms of the ordinance are regulative of the rights of the parties and

we find no provision in it for the return of the money paid.

In the arguments of counsel it appears that plaintiff is in the actual possession of the vacated alley, and has been since the ordinance became effective, by the payment of the money now sought to be recovered back. While the city could not sell the land vacated, neither could it have been coerced into vacating the alley so that plaintiff might become possessed of it. But the city did vacate the alley and conforming to the terms of the ordinance plaintiff paid the price which gave vitality to the ordinance. If, as contended, plaintiff could not have been compelled to make the payment, then the paying of the money was purely a voluntary act, and it is elementary law that money voluntarily paid cannot be recovered in an action at law.

The special count demurred to did not state a cause of action and the demurrer was therefore properly sustained.

It is our opinion that the city is not liable under the ordinance set out in the special count to refund the money paid by plaintiff to make that ordinance operative.

The judgment of the Superior Court is affirmed.

AFFIRMED.

was time no provision in it for the return of the money

paid.

In the arguments of counsel it appears that

plaintiff is in the actual possession of the vacant alley, and has been since the ordinance became effective, by the payment of the money now sought to be recovered back. While the city could not sell the land vacated, neither could it have been converted into vacating the alley so that plaintiff might become possessed of it. But the city did vacate the alley and according to the terms of the ordinance plaintiff paid the price which gave vitality to the ordinance. If, as contended, plaintiff could not have been compelled to make the payment, then the paying of the money was purely a voluntary act, and it is elementary law that money

voluntarily paid cannot be recovered in an action at law. The special court deemed to did not state a cause of action and the demurrer was therefore properly sustained.

It is our opinion that the city is not liable under the ordinance set out in the special court to refund the money paid by plaintiff to make that ordinance effective.

The judgment of the Superior Court is affirmed.

APPROVED.

6-6-1915

221 - 21616.

GENERAL CEMENT GUN COMPANY,
a corporation,

Defendant in Error,

vs.

THE TEMPLE ENGINE AND PUMP
COMPANY, a corporation,

Plaintiff in Error.)

203 T.A. 338

ERROR TO

MUNICIPAL COURT,

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

The General Cement Gun Company, a corporation,
brought suit in the Municipal Court of Chicago, against
The Temple Engine and Pump Company, a corporation, to
recover the purchase price of a gasoline engine. The
case was tried before the court and a jury. A verdict
was returned in favor of the plaintiff for \$850, on
which judgment was entered and defendant prosecutes this
writ of error.

In 1913, the plaintiff was under contract to
do some work for the City of Nashville, Tennessee, and
sought to purchase from defendant certain machinery re-
quired in the prosecution of the work. After considerable
correspondence between the parties in this regard, an
agreement was finally entered into, whereby the defendant
sold to plaintiff a gasoline engine, pump, tank, clutch
and pulley for \$920. The defendant guaranteed the engine
in certain respects, and agreed that if it was not as
guaranteed, it might be returned and the purchase price
refunded. The defendant in accordance with the agreement

338 A 1002

GENERAL INVESTIGATIVE DIVISION
U. S. DEPARTMENT OF JUSTICE

Defendant in Error

TO

VS.

UNITED STATES OF AMERICA

BY

THE UNITED STATES AND THE
DEPARTMENT OF JUSTICE

Plaintiff in Error

THE FOLLOWING IS A SUMMARY OF THE FACTS OF THE CASE:

On the 1st day of May, 1933,

The General Investigative Division, a corporation,
located at 1111 Broadway, New York City, against
the People's Trust and Savings Bank, a corporation, to
recover the purchase price of a machine weighing. The
case was tried before the court and a jury. A verdict
was returned in favor of the plaintiff for \$1000, on
which judgment was entered and defendant procured this
 writ of error.

In 1913, the plaintiff was not a corporation to
do some work for the City of New York, Tennessee, and
some to purchase from defendant certain machinery re-
quired in the prosecution of the work. After negotiations
concluded between the parties in this regard, an
agreement was orally entered into, whereby the defendant
was to furnish a machine engine, pump, tank, and other
and delivery for \$1000. The defendant furnished the engine
in certain respects, and agreed that if it was not as
satisfactory, it could be returned and the machine price
returned. The defendant in accordance with the agreement

shipped the machinery to plaintiff at Nashville. Shortly after the engine was put into operation, certain parts of it broke. Plaintiff then returned the engine to defendant at Chicago, demanded that the purchase price be refunded, and upon the defendant's refusing to do so, this suit was instituted.

It appears from the evidence that on August 21, 1913, the defendant wrote the plaintiff describing the engine, pump, tank, clutch and pulley, and giving the sales price, \$850 for the engine, \$39 for the pump, \$6 for the tank and \$25 for the clutch and pulley. The defendant therein stated that it would guarantee the engine to be economical in the consumption of fuel and oil and entirely successful on kerosene; that it would develop "full rated horse power;" that the material and workmanship was of the best and that it would take the engine back at the full price paid if it was not as represented. The next day defendant again wrote plaintiff pointing out the good qualities of the engine, giving the number of revolutions per minute that the engine would operate, and the number of horse power it would develop; and stated that if it did not fulfill all of the claims made in the letters and catalogue, plaintiff might return it within thirty days and defendant would thereupon refund the purchase price in full. Three days later, August 25th, the defendant again wrote the plaintiff stating that they would allow a period of sixty days instead of thirty days in which the engine could be had on approval by the plaintiff, and that if at any time within sixty days after the purchase, plaintiff found the engine "to be other than we have represented it in our

tripped the machinery to plaintiff at Newville. Shortly after the engine was put into operation, certain parts of it broke. Plaintiff then returned the engine to defendant at Chicago, demanding that the purchase price be refunded, and when the defendant's refusing to do so, this suit was instituted.

It appears from the evidence that on August 21, 1912, the defendant wrote the plaintiff demanding the engine, pump, tank, clutch and pulley, and giving the sales price, \$550 for the engine, \$25 for the pump, \$5 for the tank and \$25 for the clutch and pulley. The defendant therein stated that it would guarantee the engine to be economical in the consumption of fuel and oil and entirely successful on kerosene; that it would develop 1000 horse power; that the material and workmanship was of the best and that it would take the engine back at the full price paid if it was not so represented. The next day defendant again wrote plaintiff pointing out the good qualities of the engine, giving the number of revolutions per minute that the engine would operate, and the number of horse power it would develop; and stated that if it did not fulfill all of the claims made in the letter one claim, plaintiff might return it within thirty days and defendant would thereupon refund the purchase price in full. Three days later, August 28th, the defendant again wrote the plaintiff stating that they would allow a period of sixty days instead of thirty days in which the engine could be had on approval by the plaintiff, and that if at any time within sixty days after the purchase, plaintiff found the engine "is in other than as have represented it in our

previous correspondence to you, or in our catalogue, we will either make it right or you may return it to us, and we will refund you your money in full." On the same day, plaintiff wrote the defendant, "Please ship the following goods:" Then follows a description of the engine, pump, tank, clutch and pulley. All of the goods were to be purchased for the sum of \$920. The letter further stated: "This order is given on condition that you guarantee the above engine to be perfect in all respects and to develop continuously 50 H.P. at 50 R.P.M. with kerosene fuel, using not to exceed 1/10 gallon H.P. per hour and that further you will refund the price of this equipment at any time within sixty days from the date of shipment if the engine does not make good as above." Afterwards on the same day, the defendant wrote the plaintiff acknowledging receipt of the order, describing the machinery and price in the same language used by the plaintiff. The letter then stated: "This engine is guaranteed to develop continuously 50 horse power with kerosene fuel, not using an excess of one-tenth gallon per horse power per hour. This engine is also guaranteed to be free from any imperfections in material and workmanship throughout the whole life of the engine. If the engine does not do as guaranteed, and the defect is reported to us within sixty days of date of delivery, we hereby agree to make any imperfections right or to take back the engine and refund the whole of the purchase price."

The defendant contends that this last letter written by it constitutes the contract; that prior negotiations were merged in the contract, and therefore it was error to admit in evidence any of the prior correspondence or testimony as to prior negotiations.

practical correspondence to you, or in any other way, we will
either make it right or you may return it to us, and we will
refund you your money in full." In the same way, practically

every statement, "I have with the following goods:"
There follows a description of the engine, pump, tank, clutch
and battery. All of the goods were to be purchased for the
sum of \$1000. The letter further stated: "This order is
given on condition that you guarantee the above engine to
be perfect in all respects and to develop continuously 30
H.P. at 2000 R.M. with kerosene fuel, using not to exceed
1/10 gallon H.P. per hour and that further you will refund
the value of this equipment at any time within sixty days
from the date of shipment if the engine does not meet the
above." Afterwards on the same day, the defendant wrote
the plaintiff acknowledging receipt of the order, and
the machinery was put in the same package used by
the plaintiff. The letter then stated: "This engine is
guaranteed to develop continuously 30 horse power with
kerosene fuel, not using an excess of one-half gallon per
hour per horse power. This engine is also guaranteed to
be free from any irregularities in material and workmanship
throughout the whole life of the engine. If the engine
does not do as guaranteed, and the defect is reported to
us within sixty days of date of delivery, we hereby agree
to make any irregularities right or to take back the engine
and refund the value of the engine and fuel."

The defendant contends that this last letter
written by it constitutes the contract; that prior to this
time was signed in the contract, and that it is and
ever to make it a part of the order correspondence
or testimony as to what was said.

The witness McIntyre, on behalf of the defendant, testified that C. L. Dewey, representing the plaintiff, called at the defendant's place of business, August 25th, and handed the witness the written order above mentioned; that thereupon the witness and Dewey submitted the order to Kennedy, superintendent of the defendant company; that it was then agreed that the "500 R.P.M.", mentioned in the order should be stricken out, and that, as the order provided that the engine might be returned within sixty days instead of thirty if not as represented, plaintiff should not have the option of returning the goods, but defendant should have the option of repairing any defect that might develop, or have the engine returned and refund the purchase price. The superintendent Kennedy also testified on behalf of the defendant, but did not corroborate McIntyre in this regard, nor was he asked any questions concerning the changes above mentioned. Counsel for defendant stated in their brief that the testimony of McIntyre in reference to these changes was not contradicted, and argue that it is therefore conclusively established that defendant's letter of August 25th constitutes the contract between the parties. If counsel's statement in reference to this testimony were born out by the record, there would be much force in his contention, but we find that the testimony of McIntyre is squarely contradicted by Dewey. Dewey testified on behalf of the plaintiff that he did not go to defendant's place of business on August 25th, but mailed the order and that the conversation testified to by McIntyre did not occur; that he never agreed that any change could be made in the order. Plaintiff contends that the order it mailed to the defendant August 25th together with previous conversations and corres-

The witness McIntyre, on behalf of the defendant, testified that C. L. Dewey, representing the plaintiff, called at the defendant's place of business, August 25th, and handed the witness the written order above mentioned; that in conversation the witness and Dewey suggested the order to Kennedy, superintendent of the defendant company; that it was then agreed that the "500 H.P.M.", mentioned in the order should be stricken out, and that, as the order provided that the engine might be returned within sixty days instead of thirty if not as represented, plaintiff should not have the option of returning the goods, but defendant should have the option of repairing any defect that might develop, or have the engine returned and return the purchase price. The superintendent Kennedy also testified on behalf of the defendant, but did not corroborate McIntyre in this regard, nor was he asked any questions concerning the changes above mentioned. Counsel for defendant stated in their brief that the testimony of McIntyre in reference to these changes was not contradicted, and agree that it is therefore conclusively established that defendant's letter of August 25th constitutes the contract between the parties. If counsel's statement in reference to this fact-money were born out by the record, there would be much force in his contention, but we find that the testimony of McIntyre is adversely contradicted by Dewey. Dewey testified on behalf of the plaintiff that he did not go to defendant's place of business on August 25th, but mailed the order and that the conversation testified to by McIntyre did not occur; that he never agreed that any change could be made in the order. Plaintiff contends that the order it mailed to the defendant August 25th together with previous conversations and corres-

pendence between the parties constitute the contract. The contention of the defendant that all prior negotiations were merged in the contract as set forth in its letter of August 25th, and that prior correspondence was inadmissible to vary the terms of the contract, has no application to the facts of this case. The question was not one of varying a written instrument by parol evidence, but it was a question for the jury to determine what constituted the contract between the parties. Previous correspondence and oral testimony were therefore properly admitted in evidence so that the jury might determine under the instructions of the court what the contract between the parties was.

Defendant next contends that the contract was one entire transaction and not severable; that it could not be rescinded in part and affirmed in part, and that as plaintiff returned only the engine and did not return the other machinery, the court should have instructed the jury, as requested, at the close of the plaintiff's case, to find the issues for the defendant.

In support of this contention, it is argued that as the contract, evidenced by defendant's letter of August 25th, provided for the sale of the several items of machinery for a lump sum of \$920, without any separate prices for the different items, it conclusively shows that the transaction was entire and not severable. In defendant's letter of August 25th, it is stated that if the engine does not do as guaranteed, and if it is shown to be defective, and the defects are not cured, the defendant "will take back the engine and refund the whole of the purchase price." It will be noticed that nothing is said about the defendant's taking back any of the other machinery. In plaintiff's

between the parties constitute the contract. The contract of the defendant that all their negotiations were subject to the contract as set forth in the letter of January 1904, and that their correspondence was confidential as to the terms of the contract, has no application to the issue of this case. The question was not one of setting a written instrument by parol evidence, but it was a question for the jury to determine what constituted the contract between the parties. Their correspondence and oral testimony were introduced properly and it is evidence that the jury might determine under the instructions of the court that the contract between the parties was.

The Bureau has no objection.

Respectfully,
J. Edgar Hoover
Director

In report of class coordination, it is stated that
on the subject, evidence of defendant's intent to commit
murder, provided for the sale of the several items of defendant
for a lump sum of \$200, without any separate return for the
different items, is conclusively shown that the transaction
was entire and not severable, in defendant's letter of
August 28th, it is stated that if the engine does not go
as expected, and if it is shown to be defective, and the
defects are not covered, the defendant will have back the
engine and refund the price of the engine motor." It
will be noted that nothing is said about the defendant's
taking back any of the other machinery. In defendant's

order of August 25th, it is stated that if the engine is not as represented, the defendant agrees to refund the purchase price of the equipment. From a consideration of all the testimony in this regard, and holding, as we do, that the question as to what the contract was, was a proper question for the jury, we are of the opinion that the question whether the contract was severable, was likewise properly submitted to the jury.

Defendant further contends that the verdict is not supported by the evidence, in that the contract, which was embodied in defendant's letter of August 25th, provided that if the engine was not as guaranteed, the plaintiff should report any imperfections, and that these should then be remedied by the defendant; that the plaintiff did not give the defendant an opportunity to repair the engine, and that it could not return the engine without having first given the defendant an opportunity to do so. It is conceded that by the terms of plaintiff's order of August 25th, it had the option to return the machinery, and as we have stated, it was a question for the jury as to what the contract was. The court instructed the jury on the theory contended for by both parties as to which had the option in this regard. The jury by their verdict found what the contract was, and under the instructions of the court found that the plaintiff had the option of returning the machinery. This contention of the defendant is therefore untenable.

Defendant also contends that the court erred in charging the jury that it was admitted that the cost price of the engine was \$850. In support of this contention, it is

order of August 23rd, it is stated that it was not
not as requested, the defendant's request is refused and
therefore the order of August 23rd, it is stated that it was not
all the testimony in this regard, and nothing, as we see,
that the question as to what the correct was, was a proper
question for the jury, and not of the opinion that the
question whether the contract was enforceable, was a proper
question submitted to the jury.

Defendant further contends that the verdict
is not supported by the evidence, in that the contract,
which was embodied in defendant's letter of August 23rd,
provided that if the engine was not as represented, the
plaintiff would accept any replacement, and that the en-
gine should then be replaced by the defendant; that the plain-
tiff did not give the defendant an opportunity to replace
the engine, and that it could not replace the engine without
having first given the defendant an opportunity to do so.
It is conceded that by the terms of plaintiff's order of
August 23rd, it was the duty of the defendant to replace
and as we have noted, it was a question for the jury as
to what the contract was. The court instructed the jury
on the theory presented by the defendant as to what
was the duty of the defendant. The jury, by their verdict,
found that the contract was, and under the instructions
of the court found that the plaintiff had the right of
replacing the engine. This conclusion of the defendant's
therefore erroneous.

Defendant also contends that the court erred in
charging the jury that it was entitled to the test engine
at the engine was 1917. It suggests to the jury that it is

urged that all the machinery was sold for one sum, \$920, and that there was not a separate price for each item. We think there can be no question that the evidence shows the price of the engine was \$850.

Objection is also made to the instructions of the court, in that they are contradictory, as to which of the parties had the option of returning the engine. It was entirely proper for the court to give instructions embodying both the plaintiff's and the defendant's theory of the case. Furthermore, defendant did not make this objection at the time the instructions were given, and is therefore not in a position to do so in this court. Bent v. Farnald, 159 Ill. App. 552.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

written that all the machinery was sold for one sum, \$2500, and that there was not a separate price for each item. We think there can be no question that the evidence shows the price of the engine was \$2500.

Objection is also made to the instructions of the court, in that they are contradictory, as to when the parties had the option of returning the engine. It was timely passed for the court to give instructions embodying both the plaintiff's and the defendant's theory of the case. Furthermore, defendant did not make this objection at the time the instructions were given, and is therefore not in a position to do so in this court. Boyd v. Turpin, 122 Ill. App. 528.

Finding no reversible error in the record, the judgment of the appellate court of Illinois is affirmed.

AFFIRMED.

LINCOLN ELECTRIC HEATING APPLIANCES,
Incorporated,

Defendant in Error,

vs.

RICHARD A. SCHULTZ,

Plaintiff in Error.

203 I.A. 340

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The Lincoln Electric Heating Appliances, incorporated, brought this suit against Richard A. Schultz, to recover \$1000 damages. The case was tried before the court without a jury, and judgment was entered in favor of plaintiff for the amount of its claim. To reverse this judgment the defendant prosecutes this writ of error.

~~The record is in hopeless confusion, but we are able after much labor to ascertain that~~ Plaintiff furnished materials to the defendant, with which the latter was to make certain parts of electric lanterns for the plaintiff. Defendant also agreed to make certain dies and other tools for the plaintiff. Several orders were given by the plaintiff, and some of these were paid for in three different payments, aggregating \$175. It also paid \$138.60 under protest February 8, 1915.

Plaintiff contends that it is entitled to recover from the defendant the amount which it has paid, \$313.60 and this apparently was the view of the trial court. We, however, are of the opinion that the \$175 paid by the plain-

043 A. 340

LIENHART ELECTRIC HEATING APPLIANCE CO., INCORPORATED

Defendant in Error

UNITED STATES COURT OF DISTRICTS

vs.

RICHARD A. SCHULTZ

Plaintiff in Error

Mr. FRANKLIN JUSTICE O'CONNOR delivered the opinion of the court.

The Lienhart Electric Heating Appliances, Inc., a corporation, created and owned by Richard A. Schultz, to recover \$1000 damages. The case was tried before the court without a jury, and judgment was entered in favor of plaintiff for the amount of his claim. To reverse this judgment the defendant introduced this writ of error.

The record in an extensive case, but the only material which bears on the question of liability is the material in the defendant's evidence. The latter was to make certain parts of electric heaters for the plaintiff. Defendant also agreed to make certain gas and other parts for the plaintiff. Several orders were given by the plaintiff, and some of these were paid for in three different payments, aggregating \$1175. It also paid \$150.00 under protest February 8, 1918.

Plaintiff contended that it is entitled to recover from the defendant the amount which it was paid, \$1325.00, and this apparently was the view of the trial court. However, one of the stipulations was that the \$1175 paid by the plaintiff

tiff cannot be recovered by it. Plaintiff contends that this amount was not paid, but was given to the defendant in the form of a loan, but we are firmly of the opinion that this contention of the plaintiff was an afterthought. When this money was paid, plaintiff had examined and accepted the work which defendant had done. Plaintiff was experienced in that line of business, and is now estopped from making any claim to the \$175.

The record shows that on February 3rd, plaintiff demanded the return of considerable material which it had theretofore delivered to the defendant, to be used in the making of the lanterns. The defendant refused to deliver any of this material until plaintiff paid certain bills amounting to \$138.60. Plaintiff contended that it did not owe this amount, nor any part of it, but in order to obtain its material which it needed to fulfill an existing contract, it paid this amount under protest in writing. A witness for the plaintiff testified that the several bills which the defendant tendered aggregating \$138.60 were false bills; that some of them had already been paid, and his version seems to have been adopted by the trial court, and we are unable to say that this finding is manifestly against the weight of the evidence. Money paid under these circumstances is recoverable. Hollingshead & Blei v. Pittsburgh Steel Co., Gen. No. 21324, Appellate Court, First Dist.; City of Chicago v. N. W. Mutual Ins. Co., 218 Ill. 40; Rees v. Schmidt, 164 Ill. App. 250; Chicago Tel. Co. v. Illinois Glass Co., 234 Ill. 535.

making any claim to the life.
 tenured in that line of business, and is now accepted from
 of the work which defendant has done. Plaintiff was expec-
 when this story was told, Plaintiff had examined and accepted
 that this contention of the Plaintiff was an advertisement.
 in the form of a loan, but we are fairly of the opinion
 this account was not told, but was given to the defendant
 still cannot be recovered by the Plaintiff because that

The record shows that on February 21st, 1911, the defendant delivered to the plaintiff a certain bill for the return of a certain bill, which it had theretofore delivered to the defendant, to be used in the making of the lantern. The defendant refused to deliver any of this material until plaintiff paid certain bills amounting to \$138.60. Plaintiff contended that it did not owe this amount, nor any part of it, but in order to obtain its material which it needed to fulfill an existing contract, it paid this amount under protest in writing. A witness for the plaintiff testified that the material bills which the defendant tendered representing \$138.60 were false bills; that some of them had already been paid, and his version seems to have been adopted by the trial court, and we are unable to say that this finding is manifestly against the weight of the evidence. Nor is paid under these circumstances is recoverable. Hollingsworth v. Hollingsworth, 101 Cal. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875

Included also in the amount of the judgment is \$210 which the plaintiff claims as loss of profits on a contract which it held, occasioned by the failure of the defendant to complete his work in accordance with his agreement. There is no evidence in the record that tends to show how much profit, if any, plaintiff would have made on this contract, nor does the evidence show that plaintiff's contract was lost by reason of the failure of the defendant in any particular. This item, therefore cannot be allowed.

The court also allowed the plaintiff and included in the judgment items of \$123.39 and \$405.19, making a total of \$528.58, being the value of the materials returned by the defendant to the plaintiff at the time the plaintiff made the payment under protest. The evidence shows that some of this material was delivered to the defendant on February 2nd and 3rd, and it was all returned to the plaintiff on February 8th. It also shows that a great part of the material was in the same condition when returned as it was when delivered to the defendant, and there is no evidence showing why this would be of less value when returned to the plaintiff than it was when in the hands of the defendant. A witness for the plaintiff did testify, however, that he examined this material after it was returned and that it was of no value, except as junk, but this valuation is not sustained under the evidence in this case, in the absence of any showing why it depreciated in such a short space of time. The evidence also shows that some of this material had been worked upon in making the lanterns; how much does not appear. The burden was upon the plaintiff to prove the amount of its damages, and it has not sus-

Included also in the terms of the agreement is the obligation of the defendant to complete his work in accordance with the contract which is not, occasioned by the failure of the defendant to complete his work in accordance with the agreement. There is no evidence in the record that tends to show how much profit, if any, plaintiff would have made by this contract, nor does the evidence show that plaintiff's contract was lost by reason of the failure of the defendant in any particular. This issue, therefore, cannot be allowed.

The court also allowed the plaintiff and defendant in the judgment items of \$123.50 and \$422.15, making a total of \$545.65, being the value of the materials returned by the defendant to the plaintiff at the time the plaintiff made the payment under protest. The evidence shows that some of this material was delivered to the defendant on February 2nd and 3rd, and it was all returned to the plaintiff on February 8th. It also shows that a great part of the material was in the same condition when returned as it was when delivered to the defendant, and there is no evidence showing why this would be of less value when returned to the plaintiff than it was when in the hands of the defendant. A witness for the plaintiff testified, however, that he examined this material after it was returned and that it was of no value, except as found, but that valuation is not sustained under the evidence in this case, as the absence of any showing why it is depreciated is not a matter of time. The evidence also shows that at this material had been worked upon in making the contract; how much does not appear. The burden was upon the plaintiff to prove the amount of the damages, and it was not allowed.

tained that burden in reference to these materials. It is therefore not entitled to have included in the judgment the item of \$528.58.

The other items claimed by the plaintiff are for expenditures made by it for correspondence, advertising, agents, cartage, and rent and help while its factory was idle. There is no evidence in the record to justify recovery of any of these items.

The judgment of the Municipal Court of Chicago will therefore be reversed, but the cause will not be remanded, as the facts are sufficiently before us. We hold that the plaintiff is entitled to recover \$138.60 and no more.

The judgment of the Municipal Court of Chicago is therefore reversed and judgment will be entered in this court in favor of the plaintiff for \$138.60.

JUDGMENT REVERSED AND JUDGMENT HERE.

being that burden in reference to these matters. It is
therefore not advised to have included in the judgment the
item of \$200.00.

The other items claimed by the plaintiff are for
expenses made by it for transportation, advertising,
agents, postage, and rent and help while the factory was
idle. There is no evidence in the record to justify re-
covery of any of these items.

The judgment of the Municipal Court of Chicago
will therefore be reversed, but the case will not be
reopened, as the facts are sufficiently before us. We
hold that the plaintiff is entitled to recover \$100.00
and no more.

The judgment of the Municipal Court of Chicago
is therefore reversed and judgment will be entered in this
court in favor of the plaintiff for \$100.00.

REVEREND JUSTICE AND ATTORNEY GENERAL.

326 - 21722

MAX NICKOL,

Plaintiff in Error,

vs.

DWIGHT M. CLARK and
JOHN E. TRAEGER, Sheriff
of Cook County, Illinois,

Defendants in Error.)

203 T.A. 342

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

This is a proceeding for the trial of right
of property, brought by Max Nickol against Dwight M.
Clark and John E. Traeger, Sheriff of Cook County, Illi-
nois. The case was tried before the court, without a
jury, who found that the right to the property was in the
defendants, and judgment was entered on the finding. To
reverse this judgment, plaintiff prosecutes this writ of
error.

The evidence tends to show that Leonhard Januchowski purchased the property involved in this proceeding, one seven passenger automobile, from the plaintiff. Neither the date of the purchase nor the price which was to be paid appears. On October 19, 1914, there was a balance due of \$400. On that date Januchowski borrowed \$350 from the plaintiff and executed a chattel mortgage on the automobile for the amount he then owed, \$750. This mortgage was not recorded. The indebtedness covered by the mortgage became due February 19, 1915, and on that date, Januchowski being unable to pay plaintiff, delivered the automobile to him,

348 11 342

Plaintiff in error

Max Simon

Answer to

Municipal Court

of Chicago

Wm. H. Simon and
John H. Simon, Sheriff
of Cook County, Illinois

Defendants in error

THE PRESIDENTIAL ELECTION COMMISSION

opinion of the court

This is a proceeding for the trial of right

of property, brought by Max Simon against Wm. H.

Clark and John H. Simon, Sheriff of Cook County, Illi-

nois. The case was tried before the court, without a

jury, the court finding the right to the property was in the

defendants, and judgment was entered on the finding. To

reverse this judgment, plaintiff presented this writ of

error.

The evidence tends to show that defendant Simon

owns and purchased the property involved in this proceeding,

one seven passenger automobile, from the plaintiff. Neither

the date of the purchase nor the price paid was to be paid

experts. On October 12, 1914, there was a balance due of

\$400. On that date defendant borrowed \$200 from the

plaintiff and executed a chattel mortgage on the automobile

for the amount he then owed, \$200. This mortgage was not

recorded. The indebtedness covered by the mortgage became

due February 12, 1915, and on that date, defendant failed

to pay plaintiff, delivered the automobile to him,

and thereupon plaintiff canceled the indebtedness and chattel mortgage. At the same time Januchowski executed and delivered a bill of sale for the automobile to plaintiff. The automobile was left with plaintiff until February 22, 1915, when it was again returned to Januchowski. At that time the parties executed a written agreement whereby plaintiff loaned to Januchowski the automobile, for a term of eight months. The agreement provided that "after the expiration of eight months the party of the second part (Januchowski) agrees to pay to the party of the first part (plaintiff) the sum of nine hundred dollars therefor receiving title resp. Ownership papers (Bill of Sale) from the party of the first part. In case the party of the second part shall refuse to pay the amount of \$900 at the expiration of eight months, then he shall pay to the party of the first part \$150, One Hundred Fifty Dollars for damages." It further provided that Januchowski should carry the license and keep the automobile in good condition and repair, all at his own expense.

The defendant Clark obtained a judgment against Januchowski, April 7, 1915. Execution was issued on this judgment and the automobile taken by the sheriff. This action was thereupon brought by the plaintiff to recover the automobile. It further appears from the evidence that Januchowski on March 24, 1915, made an affidavit, which was filed with the Secretary of State, for the purpose of obtaining a license to operate the automobile, wherein he stated that he was the owner of the car and had owned it for two years.

and the person plaintiff canceled the indebtedness and
shortly thereafter. At the same time Januchowski executed
and delivered a bill of sale for the automobile to
plaintiff. The automobile was left with plaintiff until
February 22, 1915, when it was again returned to Januchowski.
At that time the parties executed a written agreement whereby
plaintiff loaned to Januchowski the automobile, for a term
of eight months. The agreement provided that "after the
expiration of eight months the party of the second part
(Januchowski) agrees to pay to the party of the first
part (plaintiff) the sum of nine hundred dollars therefor
receiving title pass. Whereupon Januchowski (Bill of Sale)
from the party of the first part. To have the party of
the second part shall return to pay the amount of \$900
at the expiration of eight months, then he shall pay to
the party of the first part \$100, for interest fifty dollars
for damages." It further provided that Januchowski should
carry the license and keep the automobile in good condition
and repair, all at his own expense.

The defendant Clark obtained a judgment against
Januchowski, April 7, 1915. Execution was issued on this
judgment and the automobile taken by the sheriff. This
action was thereupon brought by the plaintiff to recover
the automobile. It further appears from the witness that
Januchowski on March 24, 1915, made an affidavit, which was
filed with the Secretary of State, for the purpose of obtain-
ing a license to operate the automobile, wherein he stated
that he was the owner of the car and had owned it for two
years.

Counsel for plaintiff contends that the transaction between the plaintiff and Januchowski was a bailment, and was not a conditional nor an absolute sale; that the automobile belonged to plaintiff, and therefore was not subject to be taken to satisfy a judgment against Januchowski. A great many authorities are cited from this and several other states of the union, as well as text writers, on the subject of sales. It would serve no useful purpose to analyze or discuss the authorities cited, for the reason that after a careful examination of the entire record, we are firmly of the opinion that the cancellation of the mortgage, the execution of the bill of sale, the surrender and return of the automobile, and the agreement executed February 22nd, were a mere subterfuge and no title passed from Januchowski to the plaintiff. It must also be borne in mind that all the testimony as to the affidavit filed with the Secretary of State for the license came from the plaintiff and Januchowski. None of the documents executed by the parties was filed for record.

But, even if we should hold that the contract executed by the plaintiff and Januchowski February 22nd was valid, yet the plaintiff could not maintain this action, for after the expiration of eight months, Januchowski had the option to pay the plaintiff \$900 and retain the car, or return it and pay \$150 for its use.

The judgment of the Municipal Court was right, and it is affirmed.

AFFIRMED.

...that the ...
...between the plaintiff and ...
...and was not a conditional ...
...the ...
...not subject to be taken as ...
...The ...
...and several other ...
...writers, on the ...
...the purpose to ...
...for the reason that after a ...
...entire record, we are ...
...collation of the ...
...only, the ...
...and no ...
...must also be ...
...affiliated ...
...came from the ...
...documents ...
...But, even if ...
...accounted for the ...
...was ...
...for after the ...
...the ...
...or return it and pay ...
...The ...
...and if ...

JAMES L. MARINO, for use of
Frank Surianello,
Plaintiff in Error,

vs.

ANTONIO PARISI and NICOLA MONACO,
Defendants in Error.)

203 I.A. 352

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

James L. Marino, for use of Frank Surianello,
brought garnishment proceedings against Antonio Parisi and
Nicola Monaco. The case was tried before the court without
a jury, the issues were found in favor of the garnishees
and judgment entered on the findings. To reverse this judg-
ment, the plaintiff prosecutes this writ of error.

It appears that on April 22, 1915, Surianello obtained
a judgment against Marino for \$97.10 and \$3 court costs. An
execution was issued thereon and returned "no property
found." There after this suit was brought.

The garnishees filed an answer averring that they were
not indebted to Marino at the time of the service of sum-
mons. The evidence tends to show that on June 8, 1915,
Marino entered into a contract with Monaco whereby Marino
was to construct a certain flat building for the sum of
\$6600, \$300 cash, \$300 upon demand, and the balance \$6000
to be paid on certificates issued by the architect from
time to time as the work progressed, such certificates to be
for eighty-five percent of the estimated work done and the

2081A.352

JAMES L. MARINE, for use of
Frank Emilienke,
Defendant in Error.

WASHER IN

MUNICIPAL COURT

OF CHICAGO.

ANTONIO PARRINI was NICKOLA ROMANO,
Defendant in Error.

MR. PRESIDENT JUSTICE O'CONNOR delivered the

opinion of the court.

James L. Marine, for use of Frank Emilienke,

from his garnishment proceedings against Antonio Parrini and
Nickola Romano. The case was tried before the court without
a jury, the issues were found in favor of the defendant
and judgment entered on the finding. To reverse this judg-
ment, the plaintiff presented this writ of error.

It appears that on April 22, 1916, Emilienke obtained
a judgment against Marine for \$27.10 and 3 cents costs. An
execution was issued thereon and returned "no property
found." Thereafter this writ was granted.

The defendant filed an answer averring that they were
not indebted to Marine at the time of the return of the
writ. The plaintiff failed to show that on May 2, 1916,
Marine entered into a contract with Emma Harvey Marino
was to construct a laundry building for the sum of
\$500, \$250 cash, \$250 upon demand, and the balance when
to be paid on certificates issued by the architect from
time to time as the work progressed, each certificate to be
for thirty-five percent of the estimated work done and the

balance of fifteen per cent to be retained until the completion of the building. By the terms of the contract Marino expressly waived any and all liens for himself as well as all sub-contractors. It further appears that the garnishee Parisi had entered into a contract with the co-garnishee Monaco whereby Parisi agreed to loan Monaco \$6400 to be used in paying for the construction of the building, the payments to be made by Parisi from time to time as the work progressed. The evidence further shows that at the time of service summons on the garnishees \$600 had been paid Marino on account of the work; that subsequently and prior to the trial there was a further payment made to the contractor Marino of about \$1500; ^{and} that there were considerable sums of money due for work performed and materials furnished by sub-contractors and material men. From the foregoing it clearly appears that Marino had no claim or demand against the garnishee Parisi, and therefore the judgment in favor of said garnishee was proper. Webster v. Steele, 75 Ill. 544; Wilcus v. Kling, 87 Ill. 107. By the terms of the contract for the construction of the building, Marino expressly waived any right to a mechanic's lien, and as a result, the sub-contractors could not enforce a lien on the premises. Rittenhouse Co. v. Warren Co., 264 Ill. 619; Cameron Co. v. Geseke, 251 Ill. 402.

The uncontradicted evidence shows that Monaco was indebted to Marino, and that subsequent to the service of process he paid Marino about \$1500. This was subject to garnishment, and the court therefore erred in discharging the garnishee Monaco. Wilcus v. Kling, supra.

The judgment of the Municipal Court, so far as the garnishee Nicola Monaco is concerned, must be reversed, but

balance of fifteen per cent to be retained until the completion of the building. In the form of the contract building expressly stated that all liens for materials as well as all sub-contractors. It further appears that the defendant Petrol had entered into a contract with the defendant Morris to supply Petrol with the construction of the building, to be used in paying for the construction of the building, and payments to be made by Petrol from time to time as the work progressed. The defendant further states that at the time of service summons on the defendant, \$500 had been paid Morris on account of the work; that subsequently and prior to the trial there was a further payment made to the defendant Morris of about \$1500; that there were considerable sums of money due for work performed and materials furnished by sub-contractors and material men. From the foregoing it clearly appears that Morris had no claim or demand against the defendant Petrol, and therefore the judgment in favor of said defendant was proper. Wheeler v. Wheeler, 78 Ill. 44; Wheeler v. Wheeler, 97 Ill. 107. As the terms of the contract for the construction of the building, Petrol expressly waived any right to a mechanic's lien, and as a result, the sub-contractor could not enforce a lien on the premises. Wheeler v. Wheeler, 78 Ill. 44; Wheeler v. Wheeler, 97 Ill. 107. Wheeler v. Wheeler, 97 Ill. 107. Wheeler v. Wheeler, 97 Ill. 107. The undersigned witnesses state that Morris was indebted to Petrol, and that subsequently to the date of process he paid Petrol about \$1500. This was done to Petrol, and the court therefore entered its judgment in favor of the defendant Morris. Wheeler v. Wheeler, 78 Ill. 44; Wheeler v. Wheeler, 97 Ill. 107. The judgment of the United States Court, so far as the defendant Morris is concerned, must be reversed, and

as all the facts are before this court, no reason exists for remanding the cause. A judgment will therefore be entered in this court in favor of James L. Marino for use of Frank Surianello, and against the garnishee Nicola Monaco, for \$100.10.

JUDGMENT REVERSED AND JUDGMENT
IN THIS COURT.

as all the facts are before this court, we reserve express for
reversing the award. The judgment will therefore be entered
in this court in favor of James H. Harting for use of Frank
Karlsmoeller, and against the partnership Nicola Klosser, for
\$100.00.

379 - 21776

AMERICAN HARD RUBBER CO.,
a corporation,

Defendant in Error,

vs.

THAD H. HOWE,

Plaintiff in Error.

203 I.A. 353

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The American Hard Rubber Co., a corporation, brought suit against Thad H. Howe, to recover \$2000 with interest thereon and \$10.50 court costs. To plaintiff's statement of claim defendant filed an affidavit of merits, which on motion of the plaintiff, was stricken from the files, and the defendant ordered to file an amended affidavit of merits within five days. After the expiration of the five days, defendant elected to stand by its affidavit of merits and thereupon was defaulted. Evidence was heard on the question of damages and the court entered judgment in favor of the plaintiff for \$2000, to reverse which the defendant prosecutes this writ of error.

The two questions to be decided are (1) the sufficiency of plaintiff's statement of claim and (2) the sufficiency of defendant's affidavit of merits.

The statement of claim alleged in substance that the Swiss American Vaporator Co. purchased certain merchandise from the plaintiff; that payment of the same was guaranteed by the defendant; that thereupon plaintiff delivered the merchandise "to the defendant"; that the price agreed

308 .A.1 228

67-1000

THE UNIVERSITY

OF CHITRE.

1947. 10. 10.

IT IS THE

to get it.

The American Bank Note Co., a corporation, brought suit against Fred M. Howe, to recover \$2000 with interest thereon and \$10.00 court costs. To plaintiff's statement of claim defendant filed an affidavit of merits, which on motion of the plaintiff, was stricken from the file, and the defendant ordered to file an amended affidavit of merits within five days. After the expiration of the five days, defendant moved to strike the affidavit of merits and the motion was granted. Evidence was heard on the question of damages and the court entered judgment in favor of the plaintiff for \$2000, to reverse which the defendant prosecutes this writ of error.

The two questions to be decided are (1) the propriety of Plaintiff's statement of claim and (2) the propriety of Defendant's affidavit of merits.

The statement of Gaudin alleged in reference that the Swiss American Reporter Co. purchased certain material from the plaintiff; that payment of the same was made by the defendant; that subsequent plaintiff delivered the materials "to the defendant"; that the price agreed

upon was \$3025 and a payment of \$1025 was made by the Swiss American Vaporator Co., leaving a balance of \$2000; that afterwards plaintiff instituted suit in the Municipal Court of Chicago and obtained a judgment against the Swiss American Vaporator Co. for \$1040, which amount was admitted to be due by the Swiss American Vaporator Co.; that the balance of plaintiff's claim amounting to \$960 was contested and not included in the judgment; that execution was issued on the judgment of \$1040 and returned "no part satisfied;" that repeated demands for payment had been made by the plaintiff upon the Swiss American Vaporator Co., which were refused; that said company was insolvent, and that any delay in reducing the balance of plaintiff's claim of \$960 to judgment would endanger plaintiff's claim against the defendant.

The defendant in his affidavit of merits swears that he has a good defense to the whole of plaintiff's demand and that the nature of his defense is as follows:

"That said plaintiff did not furnish and deliver the goods, wares and merchandise mentioned in said order and guarantees; that there was no balance of \$2000.00 due on December 3rd, 1914; that Swiss American Vaporator Co. has paid \$100.00 on account of said judgment of \$1040 mentioned in said statement of claim; that defendant is not liable for costs and interest on said claim; that plaintiff on to-wit March 1915 in consideration of A. H. Freeman agreeing to pay \$100.00 on said judgment and \$100.00 each and every week thereafter until same was paid, agreed to extend the time of payment of plaintiff's claim so that same should be paid \$100.00 cash on to-wit March 1, 1915 and \$100.00 each and every week thereafter, and that A. H. Freeman paid said plaintiff \$100.00 on account of said agreement and agreed to pay plaintiff \$100.00 each and every week thereafter."

Defendant contends that the judgment set up in plaintiff's statement of claim against the Swiss American

Upon was \$3000 and a payment of \$1000 was made by the Swiss American Vapores Co., leaving a balance of \$2000; that afterwards plaintiff introduced suit in the United States Court of Appeals and obtained a judgment against the Swiss American Vapores Co. for \$1040, which amount was admitted to be due by the Swiss American Vapores Co.; that the balance of plaintiff's claim amounting to \$2000 was not treated and not included in the judgment; that execution was issued on the judgment of \$1040 and returned "no part satisfied"; that repeated demands for payment had been made by the plaintiff upon the Swiss American Vapores Co., which were refused; that said company was insolvent, and that any delay in renewing the balance of plaintiff's claim of \$2000 to judgment would endanger plaintiff's claim against the defendant.

The defendant in his affidavit of denial states that he has a good defense to the whole of plaintiff's demand and that the nature of his defense is as follows:

"That said plaintiff did not furnish and deliver the goods, wares and merchandise mentioned in said petition and demand; that there are no balances of \$2000.00 due on December 31st, 1914; that Swiss American Vapores Co. has paid \$1000.00 on account of said judgment of \$1040 mentioned in said petition and demand; that plaintiff is not liable for costs and interest on said claim; that plaintiff on 10th March 1915 in consideration of A. F. Rasmussen agreeing to pay \$100.00 on said judgment and \$100.00 each and every year thereafter until said debt was paid, agreed to extend the time of payment of plaintiff's claim so that same should be paid \$100.00 each on 10th March 1915, 1916 and \$100.00 each and every year thereafter, and that A. F. Rasmussen paid said plaintiff \$100.00 on account of said agreement and agreed to pay plaintiff \$100.00 each and every year thereafter."

Defendant contends that the judgment set up in plaintiff's statement of claim against the Swiss American

Vaporator Co. is not conclusive against him, "but can only be introduced against him as evidence of its own existence, and not as evidence of any of the facts upon which its recovery rests;" and further that the statement of claim does not allege that the judgment was obtained for the purchase price of the goods, the payment of which was guaranteed by the defendant. Assuming that defendant's contention in this regard is correct, it has no application to the matter under consideration, as there is no contention that the allegation in reference to the judgment is conclusive against the defendant.

The defendant further contends that the statement of claim does not set up a cause of action. Defendant admits that the guaranties set forth in the statement of claim would bind him, if there was an allegation that the merchandise mentioned in the guaranties was delivered by the plaintiff to the Swiss American Vaporator Co. The statement of claim does not make such allegation, but alleges delivery was made "to the defendant". We are of the opinion, however, that this was merely a clerical error, for it is apparent from an examination of the entire statement of claim that the goods were delivered to the Swiss American Vaporator Co. and not to the defendant, the guarantor, and this too was the understanding of the defendant when he filed his affidavit of merits. The contention now urged was in no way brought to the attention of the trial court and in fact seems to be an afterthought, and is without merit. When the context affords the means of correction, the proper word will be deemed substituted. Ball v. The Tribune Co., 123 Ill. App. 235.

Vaporator Co. is not conclusive against him," but can only be introduced against him as evidence of its own existence, and not as evidence of any of the facts upon which the recovery rests;" and further that the statement of claim does not allege that the judgment was obtained for the purchase price of the goods, the payment of which was guaranteed by the defendant. Nevertheless, the fact that defendant's contention in this regard is correct, it has no application to the matter under consideration, as there is no contention that the allegation in paragraph 1 of the judgment is conclusive against the defendant.

The defendant further contends that the statement of claim does not set up a cause of action. Defendant admits that the guarantee set forth in the statement of claim would bind him, if there was an allegation that the merchandise mentioned in the guarantee was delivered by the plaintiff to the Swiss American Vaporator Co., the statement of claim does not make such allegation, but alleges a delivery made "to the defendant". We are of the opinion, however, that this was merely a clerical error, for it is apparent from an examination of the five statement of claim that the goods were delivered to the Swiss American Vaporator Co. and not to the defendant, the guarantee, and this too was the understanding of the defendant when he filed his affidavit of denial. The contention now urged was in no way brought to the attention of the trial court and in fact seems to be an afterthought and is without merit. When the context affords the means of correction, the proper word will be deemed substituted.

Kali v. The Plaintiff Co., 123 Ill. App. 232.

The defendant next contends that his affidavit of merits was sufficient and should not have been stricken; first, because it denies that the merchandise covered by defendant's guaranty was not delivered and this constitutes a complete defense. It is a sufficient answer to this contention to say that the affidavit of merits contains other allegations which were improper, as hereinafter stated, and therefore the contention made is untenable. The second reason urged why the affidavit of merits was sufficient is that payment of \$100 had been made on account of the judgment and that in consideration of Freeman's agreeing to pay \$100 per week on said judgment, the time of payment was extended, and that under the law, where the time of payment is extended without the guarantor's consent he is discharged. It is undoubtedly the settled law that where an extension of time is given the principal for the payment of money by a valid and binding agreement without the guarantor's consent, the latter is discharged. Loeff v. Taussy, 102 Ill. App. 398. But the difficulty with defendant's contention is that there is no allegation that the time of payment was extended without his consent. For aught that appears from the affidavit of merits, the time of payment may have been extended with his consent, and under the rule that a pleading is to be taken most strongly against the pleader, the court unquestionably did not err in striking the affidavit of merits from the files.

The affidavit of merits was not severable and the court was not called upon to point out the particular parts of it that were insufficient, but was warranted in holding it insufficient in its entirety.

Complaint is also made by the defendant that he is not liable for costs incurred in the suit against his principal nor for interest accruing on the judgment.

The defendant next contends that his affidavit of

merits was sufficient and should not have been stricken;

first, because it denies that the merchandise covered by defendant's guaranty was not delivered and this constitutes a complete defense. It is a sufficient answer to this contention to say that the affidavit of merits contains other allegations which were improper, as hereinafter stated, and

therefore the contention made is untenable. The second

reason urged why the affidavit of merits was sufficient is that payment of 100 had been made on account of the judgment and that in consideration of Freeman's agreeing to pay 100 per week on said judgment, the time of payment was ex-

tended, and that under the law, where the time of payment is extended without the guarantor's consent he is discharged.

It is undoubtedly the settled law that where an extension of time is given the principal for the payment of money by a valid and binding agreement without the guarantor's consent, the latter is discharged. Leely v. Leary, 100 Ill.

App. 328. But the difficulty with defendant's contention is that there is no allegation that the time of payment was extended without his consent. Nor ought that appear from the affidavit of merits, the time of payment may have been extended with his consent, and under the rule that a pleading is to be taken most strongly against the pleader, the court unquestionably did not act in striking the affidavit of merits from the files.

The affidavit of merits was not reversible and

the court was not called upon to point out the particular parts of it that were insufficient, but was warranted in holding it insufficient in its entirety.

Complaint is also made by the defendant that he

is not liable for costs incurred in the suit against his principal nor for interest accruing on the judgment.

Neither of these items was included in the judgment in the case at bar, and the point is therefore without merit.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Neither of these items was included in the judgment in the case at bar, and the point is therefore without merit.

Finding no reversible error in the record, the judgment of the Criminal Court of Chicago is affirmed.

ATTORNEYS.

93 - 21066

BRIDGET O'BRIEN,

Defendant in Error,

vs.

PETER P. SALERNO,

Plaintiff in Error.)

2482
203 I.A. 356

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error seeks the reversal of a judgment against him in favor of defendant in error for \$600.00, entered by the court on a finding in a case tried by the court without a jury. In her statement of claim, defendant in error alleged that it was for damages for personal injuries caused by the plaintiff in error's carelessly and negligently leaving a horse hitched to a wagon, untied in the street. In his affidavit of defense, plaintiff in error stated that the horse did not belong to him, and therefore he could not be held liable.

On July 7, 1914, the cause was submitted to the court without a jury, and a finding entered in favor of defendant in error, and assessing her damages at \$1,000. A motion for a new trial was entered and continued from time to time until October 10th, when an order was entered allowing a new trial, and reciting that the cause came on in regular course for trial before the court without a jury, and that "the court finds the defendant guilty * * * and assesses the plaintiff's damages at the sum of \$600.00."

2031.A.356

ALBERT C. BROWN, Plaintiff in Error,
vs.
JAMES H. BARNES, Defendant in Error.

MEMORIAL COURT,
CHICAGO, ILL.

MR. JUSTICE ROBERTS delivered the opinion of the

court.

The plaintiff in error seeks the reversal of a judgment against him in favor of defendant in error for \$500.00, entered by the court on a finding in a case tried by the court without a jury. In her statement of claim, defendant in error alleges that it was for damages for personal injuries caused by the plaintiff in error's carelessly and negligently leaving a horse hitched to a wagon, which in turn struck the horse and not belong to him, this in error stated that the horse did not belong to him, and therefore he could not be held liable.

On July 7, 1914, the case was submitted to the court without a jury, and a finding entered in favor of defendant in error, and assessing her damages at \$1,000. A motion for a new trial was entered and sustained. The case was then set for trial on October 10, 1914, and on that day entered allowing a new trial, and finding that the same case on a regular course for trial before the court without a jury, and that the court finds the defendant guilty of a negligence and plaintiff's damages at the sum of \$500.00.

No brief was filed on behalf of the defendant in error. Counsel for plaintiff in error contend that the evidence was totally insufficient to warrant a finding, and that improper evidence was received.

As to the first contention, it seems sufficient to say that the bill of exceptions recites that "the foregoing contains as much evidence as recollected by counsel and court and introduced on the trial of this cause;" as it does not purport to contain all of the evidence, the law conclusively presumes that there was evidence received sufficient to sustain the finding.

In answer to counsels' second point, it may be said that where, as in this case, the cause is tried by the court without a jury, the judgment will not be reversed on account of the court's improper admission of evidence if there is sufficient competent evidence to sustain the finding, since the court is presumed to have disregarded the evidence improperly admitted, and to have entered his finding upon the competent evidence before him. (Palmer v. Meriden Britannica Co., 188 Ill. 508.) In the absence of the bill of exceptions purporting to recite all the evidence, sufficient competent evidence to justify the finding of the court is necessarily presumed. In these circumstances, the judgment of the Municipal Court must be affirmed.

AFFIRMED.

No trial was held on behalf of the defendant in error. Counsel for plaintiff in error contended that the evidence was totally insufficient to warrant a finding, and that improper evidence was received.

As to the first contention, it seems sufficient to say that the bill of exceptions recites that "the following contents as when evidence was received by the court and introduced on the trial of this cause;" and it does not purport to examine all of the evidence, the law conclusively presumes that there was evidence received and finding to sustain the finding.

In answer to counsel's second point, it may be said that where, as in this case, the cause is tried by the court without a jury, the judgment will not be reversed on account of the court's improper admission of evidence if there is sufficient competent evidence to sustain the finding, since the court is presumed to have disregarded the evidence improperly admitted, and to have entered his finding upon the competent evidence before him. (United v. Leiden Waterman Co., 102 Ill. 500.) In the absence of the bill of exceptions purporting to recite all the evidence, sufficient competent evidence to justify the finding of the court is necessarily presumed. In these circumstances, the judgment of the National Court must be affirmed.

REVEREND.

226 - 21204

JULIA FARRELL,

Defendant in Error,

vs.

JAMES W. STAFFORD,

Plaintiff in Error.)

203 I.A. 357

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The defendant in error, who will be referred to as the plaintiff, recovered a judgment against the plaintiff in error, who will be referred to as the defendant, for \$153.50, in a suit brought for the conversion of certain goods belonging to the plaintiff. The defendant seeks to have this judgment set aside on the following grounds; . that no conversion was proved; that vindictive damages were allowed; that the amount of damages was not proved by competent evidence; that defendant was not credited with the amount claimed for set off upon which plaintiff was defaulted and that defendant's tender of the goods should have been considered in mitigation of the damages.

The evidence disclosed that the plaintiff, while a lodger at the defendant's hotel, became indebted to him to the extent of \$26.50; as she was apparently unable to pay the bill, she secured the release of her personal effects by leaving the box and barrel containing cut glass and silverware with the defendant under the following agreement:

2021 A. 357

JAMES E. STANLEY,

Defendant in Error,

vs.

UNITED STATES

OF MICHIGAN.

et al.

JAMES E. STANLEY,

Plaintiff in Error.

THE JUSTICE COURT delivered the opinion of the

court.

The defendant in error, who will be referred to as the plaintiff, recovered a judgment against the plaintiff in error, who will be referred to as the defendant, for \$10.00, in a suit brought for the conversion of certain goods belonging to the plaintiff. The defendant seeks to have this judgment set aside on the following grounds: That no conversion was proved; that the plaintiff was allowed; that the amount of damages was not proved by competent evidence; that the defendant was not credited with the amount claimed for set off when with plaintiff was not credited; and that the plaintiff's burden of the goods should have been considered in mitigation of the damages.

The evidence disclosed that the plaintiff,

while a lodger at the defendant's hotel, became indebted to him to the extent of \$10.00; he did not voluntarily agree to pay the bill, and received the refund of his personal effects by leaving the box and personal belongings and glass and silverware with the defendant under the following agreement:

"Chicago, Jany. 11, 1910.

"I hereby agree to pay my bill at Queen Hotel amounting to \$26.50 to be paid in 90 days from date and I leave as security for same one barrel and box cut glass and silverware and I agree that if I do not pay the bill within 90 days from date the Hotel can sell said goods without further notice to pay said bill.

Julia Farrell."

Four years afterwards, the defendant advertised the goods for sale at public auction, apparently pursuing the course provided for in the inn-keepers act. The testimony on his behalf is to the effect that at this auction the goods were sold to one Isaac Smith for \$5.00, but that Smith never took possession of them. The auctioneer, who was defendant's nephew, said that as Smith was not a married man, he told the witness that he could take care of them, and if at any time the bill was paid, he could get his money, by this he apparently meant the \$5.00 which he had paid. He also testified that the barrel was unopened at the time it was sold and there is no evidence that anything was said to Smith about its contents. Defendant testified that plaintiff told him that the barrel was worth between \$25.00 and \$26.00 and could be sold for that.

We do not think it is necessary to decide whether the inn-keepers act would, under ordinary circumstances, apply to the goods in question, since they were specially pledged to the defendant, and under that pledge it was within his rights to sell them at any time after the expiration of ninety days, and without notice to the plaintiff. Upon the question of liability, then, the only matter to be decided was whether there had been a bona fide sale by the defendant under the terms of the pledge, and we are of the opinion that the judge, who tried the case without a jury, was amply justified ^{in finding} that there had been no such

"I hereby agree to pay my bill at once, to wit: \$100.00 to be paid in 90 days from date and I leave an authority for same one month and one out time and I agree that if I do not pay this bill within 90 days from date the hotel will sell said goods without further notice to pay said bill.

Julius Farnell."

Four years afterwards, the defendant advertised the goods for sale at public auction, expressly reserving the same provided for in the inn-keepers act. The testimony on this point is to the effect that at this auction the goods were sold to one James Smith for \$25.00, but that Smith never took possession of them. The auctioneer, who was defendant's nephew, said that an Englishman was not a married man, he told the witness that he would take care of them, and it was at this time the bill was paid, he would get his money, by this time apparently meant the \$25.00 which he had paid. He also testified that the parcel was unopened at the time it was sold and there is no evidence that anything was sold to Smith about the contents. Defendant testified that Smith told him that the parcel was worth between \$25.00 and \$30.00 and could be sold for that.

It is not said it is necessary to decide whether the inn-keepers act would, under ordinary circumstances, apply to the goods in question, since they were specifically pledged to the defendant, and under that pledge it was within his rights to sell them at any time after the expiration of ninety days, and without notice to the plaintiff. Upon the question of liability, then, the only matter to be decided was whether there had been a pledge as defined by the defendant under the terms of the pledge, and as to of the opinion that the judge, who tried the case without a jury, was fully justified in finding that there had been no such

sale. In the first place, it appears that there is abundant evidence to justify the court in finding that the auction sale relied upon was a mere formality, but we are also of the opinion that where a pledge recites that a barrel contains cut glass and silverware,- and the defendant by his own testimony admits that he was told at the time it was pledged that it was worth between \$25.00 and \$50.00,- and the defendant is given, by the terms of the pledge, full power to sell the "goods", which necessarily includes the power to open the barrel in which they are contained. A pledgee is not justified in selling the barrel and its contents at auction without opening it or disclosing what its contents are. Such a case is clearly distinguishable from a sale under the inn-keepers^{lien} act, where the sole authority of the inn-keeper is the statute, which, it might be contended, does not give, expressly or impliedly, the right to open trunks, boxes, or barrels in which goods are contained.

So far as the values are concerned, the evidence of plaintiff was that the goods were worth several times the amount of the judgment, and that testimony, taken together with the testimony of the expert offered on behalf of the defendant, amply sustains the finding of the court. The goods had been long in plaintiff's possession; they were such as are ordinarily and customarily used in the household, and it is impossible for us to say that plaintiff's evidence in regard to their value was incompetent.

Defendant contends that as plaintiff was in default, she had no right to maintain an action in trover unless she kept her tender good by paying the amount of

sale. In the first place, it appears that there is some-
what evidence to justify the court in finding that the
execution sale held upon was a mere formality, but we are
also of the opinion that there is a pledge receipt that a
barrel containing gun glass and silverware, - and the de-
fendant by his own testimony admits that he was told at the
time it was pledged that it was worth between \$25.00 and
\$50.00, - and the defendant is given, by the terms of the
pledge, full power to sell the "goods", which necessarily
includes the power to open the barrel in which they are
contained. A pledgee is not justified in selling the
barrel and its contents as execution without opening it or
discussing what its contents are. Such a sale is clearly
statutory and liable from a sale under the insolvency
laws the sole authority of the insolvency is the statute,
which, it might be contended, does not give, expressly or
impliedly, the right to open trunks, boxes, or barrels
in which goods are contained.

As for as the value is concerned, the evidence
of plaintiff was that the goods were worth several times
the amount of the judgment, and that testimony, taken
together with the testimony of the expert offered on be-
half of the defendant, amply sustains the finding of the
court. The goods had been long in plaintiff's possession;
they were such as are ordinarily and lawfully used in
the household, and it is impossible for me to say that
plaintiff's evidence is needed to show value was in-
competent.

Defendant contends that as plaintiff was in de-
fault, she had no right to maintain an action in trover
unless she kept her goods by paying the amount of

defendant's lien in court, and cites Blain v. Foster, 33 Ill. App. 297. That case is clearly not in point, for here under defendant's own evidence, it is clear that a conversion of the goods had actually taken place, and the case, therefore, has no analogy to a case where goods are merely retained by the mortgagee.

Defendant further claims that the finding includes punitive damages, but there is nothing in the form of the finding or the amount of the damages assessed which indicates that punitive damages were actually included. As the evidence was ample to sustain the finding as one based on actual damages, we cannot, in the absence of any special finding on that point, assume that punitive damages were included. Nor can we infer from the inclusion of the words, "maliciously, wilfully and intentionally, and with intent to injure and defraud the plaintiff," in the court's general finding, that punitive damages must have been included, since the form of finding is appropriate to an ordinary case in trover, and is very similar to the language used in declarations in that form of action.

So far as defendant's claim of set off is concerned, it must be assumed, in the absence of any contrary showing, that plaintiff was duly credited with the amount claimed. Defendant's claim that the tender of the goods in open court should have been considered a mitigation of damages, cannot be sustained, for while a defendant has the right to tender in open court goods which have been converted, and have that tender considered in mitigation of damages, no such tender was made in this case, but, on the

Defendant's lien in court, and other plain v. water, 33 Ill. App. 387. That case is clearly not in point, for here under defendant's own evidence, it is clear that a conveyance of the goods had actually taken place, and the case, therefore, has no analogy to a case where goods are merely retained by the mortgagee.

Defendant further claims that the finding includes punitive damages, but there is nothing in the form of the finding or the amount of the damages assessed which indicates that punitive damages were actually included. As the evidence was ample to sustain the finding as one based on actual damages, we must, in the absence of any special finding on that point, assume that punitive damages were included. Nor can we infer from the inclusion of the words, "and loss of profits, willfully and intentionally, and with intent to injure and defraud the plaintiff," in the court's general finding, that punitive damages must have been included, since the form of finding is appropriate to an ordinary case in trover, and is very similar to the language used in declarations in that form of action.

So far as defendant's claim to set off is concerned, it must be assumed, in the absence of any contrary showing, that plaintiff was fully credited with the amount claimed. Defendant's claim that the tender of the goods in open court should have been considered a mitigation of damages, cannot be sustained, for while a defendant has the right to tender in open court goods which have been wrongfully taken, and have that tender considered in mitigation of damages, no such tender was made in this case, but, on the

contrary, the goods were brought into court and an offer made to surrender them as a full settlement of plaintiff's claim; an offer which plaintiff was not bound in any way to accept; had they been offered in mitigation of damages, a different question would arise here.

We are, therefore, of the opinion that there is nothing in this record showing error in the trial of this case or that the finding and judgment were the result of prejudice, as claimed. The judgment of the Municipal court is affirmed.

AFFIRMED.

concerning the goods were brought into court and an offer made to surrender them as a full settlement of plaintiff's claim; an offer which plaintiff was not bound in any way to accept; had they been offered in mitigation of damages, a different question would arise here.

It was, therefore, of the opinion that there is nothing in this record showing error in the trial of this case so that the finding and judgment were the result of prejudice, as claimed. The judgment of the municipal court is affirmed.

ATTEST.

NATIONAL SURETY COMPANY,
A Corporation,

Plaintiff in Error,

vs.

GOLDENBERG FURNITURE COMPANY,
A Corporation,

Defendant in Error.

203 I.A. 362

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of
the court.

The plaintiff in error brought suit against defendant in error to recover under a contract by the terms of which defendant in error was to indemnify it for any moneys paid to the Peoples Gas Light & Coke Company under the terms of a bond which it signed as surety. The facts briefly stated are that the defendant in error was made a collector for the Peoples Gas Light & Coke Company, and under its contract with the company it was bound to receive cash payments due the company and to account for, and turn over to the company each day, all moneys so collected; to secure the performance of this agreement, the bond in question was executed, and to secure the defendant in error against loss, the plaintiff in error agreed to indemnify it.

From the agreed statement of facts, it appears that on December 5th, 1913, the defendant in error received for the Gas Company the sum of \$81.18, and paid the same to the Gas Company on December 5th; that on Saturday, December 6th, it received for said Gas Company the sum of \$538.26, and placed the same in the cash drawer in the inner safe in its vault in its store; that at the

203 I.A. 362

RAILROAD COMPANY, INCORPORATED,
A Corporation of the State of Illinois

Plaintiff in Error

vs.

vs.

CHICAGO & NORTH WESTERN RAILROAD COMPANY,
A Corporation of the State of Illinois

Defendant in Error

UNITED STATES COURT
OF CHICAGO

MR. JUSTICE GORMAN delivered the opinion of

the court.

The plaintiff in error presents suit against

defendant in error to recover under a contract by the

terms of which defendant in error was to indemnify it

for any money paid to the Chicago Gas Light & Coke

Company under the terms of a bond which it signed as

surety. The facts briefly stated are that the defendant

in error was made a collector for the Chicago Gas Light

& Coke Company, and under its contract with the company

it was bound to receive cash payments for the company

and to account for, and turn over to the company each

day, all money so collected; to secure the performance

of this agreement, the bond in question was executed,

and to secure the defendant in error against loss, the

plaintiff in error agreed so indemnify it.

From the agreed statement of facts, it appears

that on December 31st, 1913, the defendant in error re-

ceived for the Gas Company the sum of \$21.13, and paid

the same to the Gas Company on December 31st; that on

Saturday, December 31st, it received for said Gas Company

the sum of \$338.26, and placed the same in the cash drawer

in the inner safe in the vault in the store; that at the

close of the day, after the amount of receipts had been determined, the defendant in error mailed to the Gas Company its check for \$538.26; that after the close of business on the night of December 6th, 1913, and before the opening of business at the defendant in error's store, Monday, December 8th, "some person or persons unknown to the defendant, and without fault or negligence on its part, broke into its premises, blew open the vault door and the inner vault door, and broke open the safe in said vault and the cash drawer in the safe, and stole therefrom the identical funds received by said defendant December 6th, 1913, being the collections made for said Gas Company, and also other money belonging to the defendant." The defendant in error immediately stopped payment on the check, and thereafter, on January 8, 1914, the plaintiff in error, in good faith, believing itself to be liable therefor, paid the Gas Company the sum of \$538.24 and demanded reimbursement, which was refused.

The collections were made by the defendant in error without compensation. We do not think that under the terms of the indemnifying contract the plaintiff in error is entitled to indemnify unless the defendant in error was liable to the Gas Company. It was expressly stipulated that the funds were stolen without fault and negligence on the part of the defendant in error, and it is therefore evident that the defendant in error was not liable to the Gas Company if it held the funds collected as bailee or trustee, and that it is liable if, upon the collection of the funds, the relation of debtor and creditor was established. It is very obvious that in the ordinary case, one who collects money for another does not

close of the day, after the amount of receipts had been determined, the defendant in error mailed to the Gas Company its check for \$532.95; that after the close of business on the night of December 22nd, 1912, and before the opening of business at the defendant in error's store, Monday, December 23rd, "some person or persons known to the defendant, and without fault or negligence on its part, broke into its premises, blew open the vault door and the inner vault door and broke open the safe in said vault and the cash drawer in the safe, and stole therefrom the identical funds received by said defendant December 22nd, 1912, before the collections made for said Gas Company, and also other money belonging to the defendant." The defendant in error immediately stopped payment on the check, and thereafter, on January 2, 1913, the plaintiff in error, in good faith, believing itself to be liable to the Gas Company, paid to the Gas Company the sum of \$532.95 and demanded reimbursement, and it was refused.

The collections were made by the defendant in error without communication. It is not clear that under the terms of the accounting contract the plaintiff in error is entitled to indemnity unless the defendant in error was liable to the Gas Company. It was expressly stipulated that the funds were stolen without fault and negligence on the part of the defendant in error, and it is not clear from the defendant's evidence that the defendant in error was not liable to the Gas Company if it held the funds collected as bailee or trustee, and that it is liable if, upon the collection of the funds, the relation of debtor and creditor was established. It is very obvious that in the ordinary case, the defendant in error would be liable to the Gas Company for the funds collected.

become his debtor, but becomes the custodian or trustee of the funds so collected. Each case, of course, must depend upon the intention of the parties. The language of the defendant in error's undertaking in the present case, is very explicit. It "agrees to account for and turn over to the Company each day all money so collected during the preceding twenty-four hours, together with all coupons, which shall in every case be detached from said gas bills for that purpose." Here, certainly, there was no intention that the money collected should become the money of the defendant in error and to accept it as a debtor; on the contrary, it was required to turn it over immediately. The fact that it might, in turning over the money, use the commercial means ordinarily used, does not alter the relations of the parties. A trustee, for instance, may turn over funds to the cestui by the use of his own personal check, and when the money is received in due course by the latter, the trust fund in the hands of the former is relieved of its trust character. It seems very clear that in the present case, the moneys received from gas bills, when placed in the vault, continued to be the funds of the Gas Company, even after the check had been mailed, and that had the defendant in error gone into bankruptcy after collecting the funds, the Gas Company would not have stood in the position of a creditor, but would have been entitled to recover the moneys collected, and would, moreover, have been entitled to follow them even if they had not been deposited in a bank to the general credit of the defendant in error. (Ferris v. VanVechten, 73 N.Y. 113; Blair v. Hill, 50 N.Y. App. Div. 33, affirmed 165 N.Y. 672.)

became the debtor, but because the collection of the funds as collected, each case, of course, must depend upon the intention of the parties. The intention of the defendant in error's undertaking in the present case, in very explicit. It appears to account for and turn over to the Germany each day all money so collected during the preceding twenty-four hours, together with all coupons, which shall in every case be detached from said bills for that purpose." Here, certainly, there was no intention that the money collected should become the money of the defendant in error and to accept it as a debtor; on the contrary, it was required to turn it over immediately. The fact that it might, in turning over the money, use the commercial means ordinarily used, does not alter the relations of the parties. A trustee, for instance, may turn over funds to the credit by the use of his own personal check, and when the money is received in due course of the bank, the trust fund in the hands of the former is maintained of its trust character. It seems very clear that in the present case, the money received from the bills, when placed in the vault, continued to be the funds of the bank, even after the check had been mailed, and that had the defendant in error gone into bankruptcy after collecting the funds, the bank Germany would not have been entitled to a credit, but would have been entitled to recover the money collected, and would, moreover, have been entitled to follow them even if they had not been deposited in a bank to the general credit of the defendant in error. (Levy v. Leventhal, 73 N.Y. 113; Levy v. Hill, 80 N.Y. App. Div. 32, affirmed 133 N.Y. 673.)

It necessarily follows from this that as the money remaining in the vault was still the property of the Gas Company, and was stolen without the fault of the defendant in error, the latter was relieved of all liability to the Gas Company, and that it therefore properly stopped payment on a check which had been drawn for the purpose of transferring that amount, since by the theft it had been discharged from its liability to account for and turn over the fund. Geist v. Pollock, 58 Ill. App. 429, the only case cited by counsel for plaintiff in error, is clearly not in point, since the testimony of the depositor in that case was that when he left the money with his employer, he told him he probably would not want it for some eight months, and it was very obviously the intention of the parties that the relation of debtor and creditor should be established.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

It necessarily follows from this that as the money remaining in the vault was still the property of the Gas Company, and was stolen without the consent of the defendant in error, the latter was relieved of all liability to the Gas Company, and that it therefore properly stopped payment on a check which had been drawn for the purpose of transmitting that amount, since by the time it had been cashed from its liability to account for and turn over the funds. Reid v. Folger, 33 Ill. App. 429, the only case cited by counsel for plaintiff in error, is clearly not in point, since the testimony of the depositor in that case was that when he left the money with his employer, he told him he probably would not want it for some eight months, and it was very obviously the intention of the parties that the relation of debtor and creditor should be established. The judgment of the Kansas City Court is affirmed.

AFFIRMED.

EUGENE A. PERIFFER,
Defendant in Error,

ERROR TO

vs.

MUNICIPAL COURT

THE HUDSON MANUFACTURING CO.,
Plaintiff in Error.

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error seeks the reversal of a judgment against it for \$601.03, entered in favor of defendant in error. For greater convenience, the parties will be designated as plaintiff and defendant.

Plaintiff was employed by the defendant as a traveling salesman for some seven or eight years, originally at a salary of \$60.00 or \$70.00 a month, and during the last few years, at a salary of \$175.00 a month. He left the employ of the defendant February 22, 1913, and the evidence of the defendant, as well as that of the plaintiff, discloses that the defendant was indebted to him in the amount for which judgment was rendered, unless defendant was entitled to charge plaintiff for certain absences from duty. These items were as follows: April 20th to 30th, ten days, May 1st to May 10th, ten days, July 29th to August 12th, fourteen days, October 30th to November 8th, November 18th to November 26th, and December 6th to December 31st. All of these items were in the year 1911; the first was twenty-two months, and the last about fourteen months before plaintiff left defendant's employ. The facts in regard to the plaintiff's absence from the road were known to the defendant at all times, but no right to make a deduction from plaintiff's salary on that account was made or suggested until after he had left its employ. On May 8th, 1911, with full knowledge of plaintiff's movements prior to that time, defendant sent plaintiff a check for \$191.25, which was the exact amount due him without

2003.1.A.364

NO. - 11424

WILLIAM A. BENTLEY
Defendant in Error

VERDICT

vs.

WILLIAM A. BENTLEY

OF COLORADO

THE UNITED STATES OF AMERICA
Plaintiff in Error

THE UNITED STATES OF AMERICA delivered the opinion of the court

The plaintiff in error seeks the reversal of a

judgment against it for \$100.00, entered in favor of the

defendant in error. For further consideration, the parties will

be designated as plaintiff and defendant.

Plaintiff was assigned by the defendant as a lawyer

for defendant for some years or about 1900, and during the

year of 1900-01 or 1901-02, and during the year of

1902, at a salary of \$100.00 a month. He left the service of

the defendant February 22, 1903, and the defendant of the

defendant, as well as that of the plaintiff, disclosed that

the defendant was indebted to him in the amount of \$100.00

and that the defendant, United States, was entitled to

charge plaintiff for certain services from July, 1900, to

July 1901, and from July 1901, to July 1902, and from

July 1902, to July 1903, and from July 1903, to July 1904,

October 1904 to November 1904, November 1904 to January 1905,

and December 1905 to January 1906. All of these items were

in the year 1905, and the plaintiff was entitled to receive

from the defendant the sum of \$100.00, and the

plaintiff. The court in regard to the plaintiff's account from

the year 1900 to the year 1901, and the

right to receive a deduction from plaintiff's salary of \$100.00

account was made in plaintiff's bill dated July 1901

and July 1902, and the defendant was entitled to

reimbursement of the same. The court in the year 1901

and the year 1902, and the defendant was entitled to

making any deductions. Also, on August 10th, 1911, with similar information in regard to plaintiff's services, it sent him a check for \$105.70, which was the amount then due without making any deduction for alleged absence from the road.

Plaintiff testified that from April 23d to April 30th, he was in Chicago waiting for a new route; that from May 2d to 5d, he took orders in Chicago; May 6th, in Lake Forest, Rock Island and Libertyville; that he was working in those towns from May 1st to May 10th; that August 2d to 7th, he took orders at Evanston, and August 12th, at Rockefeller; that from November 18th to November 26th, which included the date when his child was born, he was at home with the consent of the president of the company; that from December 6th, when his child died, to December 31st, he was also at home with the consent of the president of the company, and after talking with him about it; this period also included the holidays. During the entire time he was employed, his account was not debited with these items, and no suggestion was ever made that it was intended that it should be. There is, moreover, an entire absence of any testimony from which it can be inferred that the company intended at any time to make such a debit. The evidence so far rehearsed was sufficient to sustain, if it did not compel, a finding that it was the intention of the parties that the plaintiff should remain at home without any deduction in his salary. Such arrangements are not at all uncommon; vacations are allowed quite as a matter of course, and absences are frequently allowed to old employes without deducting from the salary, in instances similar to those shown in the case at bar. It is not always advantageous to the employer to have the expense of an employe on the road at every season of the year, and without regard to his fitness

for work. But we think that the intention of the parties is put beyond question when there is added the further evidence that on November, 1912, defendant sent plaintiff a statement covering his account from January 2nd, 1912, to November 15th, 1912, showing a balance due plaintiff of \$326.97, which was the exact amount due, and without any deduction for any of the absences now relied upon. To this must be added the fact that it was not until after February 22nd, 1913, when plaintiff left defendant's employ, that any claim was made on account of these absences, and that then, for the first time, the president of the company directed an employe to make up a statement from the data which had always been in the company's possession, and to direct the bookkeeper to enter the items on the company's journal and ledger. In short, the absences, of which the company had full knowledge, were in 1911; full and exact payments without deductions were made after some of them had occurred, and nearly a year after the last absence occurred, a statement of the amount due the plaintiff was rendered by the defendant, in which no deduction was suggested.

We are, therefore, of the opinion that the evidence is not only sufficient to sustain the finding of the jury, but that it was not open to the jury to reach any other conclusion. We are further of the opinion that the grounds for reversal presented in this case are so clearly without merit, that we are warranted in concluding that the writ of error was sued out for the purpose of delay. In such circumstances, this court is, under the decision of our Supreme Court in Baker v. Prebis, 185 Ill. 191, entitled to assess statutory damages. The judgment of the Municipal Court will be

for work. But we think that the intention of the parties is
not beyond question when there is shown the further evidence
that on November, 1912, defendant sent defendant's statement
covering his account from January 2nd, 1912, to November 1912,
1912. What is believed the similarity to that of 1912 was
the same account due, and without any deduction for any of
the charges now called upon. It is this that is shown by the
fact it was not until after January 2nd, 1912, when the
1912 1912 defendant's employee, that any claim was made to
account of these amounts, and that then, for the first time
the president of the company directed an employee to make up
a statement from the date which had already been in the com-
pany's possession, and to direct the defendant to enter the
items on the company's Journal and ledger, in March, 1912
operation, in which the company had full knowledge, was in
1912; that and what amounts without deduction were made
after some of them had occurred, and that a year after the
last balance occurred a statement of the account due the com-
pany was prepared by the defendant, in which no deduction was
suggested.

It was, however, at the meeting that the defendant
is not only entitled to receive the amount of the 1912, but
that it was not open to the company to receive any other amount
then. He was further of the opinion that the amount for
interest presented in this case was an amount in cash money,
that he was entitled to receive it and that he was
and that for the purpose of delay, it was also intended,
that could be, under the operation of the company's policy in
cases in which, now in 1912, it is in the hands of the company
defendant. The statement of the defendant from 1912 to

affirmed, and a judgment entered against the plaintiff in error and in favor of the defendant in error for the sum of \$60.00 statutory damages, in addition to the costs to be taxed, and the defendant in error will have execution therefor.

AFFIRMED.

estimated, and a judgment rendered the plaintiff in
 error and in favor of the defendant is given for the sum
 of \$50.00 attorney's fees. In addition to the above so
 be taxed, and the defendant in error will have execution
 therefor.

ATTESTED.

LOUIS WALDSCHMIDT, JESSE
W. RULE, and SAMUEL B. BROWN,
co-partners, doing business as
DUNBAR MILL & LUMBER CO.,
Defendants in Error,

vs.

THE MARSH & BINCHAM CO.,
Plaintiff in Error.)

203 T. A. 365
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error, hereinafter referred to as the defendant, seeks the reversal of a judgment against it in favor of the defendants in error, who are hereinafter referred to as plaintiffs. The facts briefly stated are that the plaintiffs filed suit to recover a balance alleged to be due for lumber shipped defendant under a written contract which called for a much larger shipment, and defendant filed a set off claiming damages at the rate of \$2.00 a thousand feet, on account of plaintiffs' failure to ship the balance of the lumber.

It would serve no useful purpose to rehearse the evidence, and it is sufficient, we believe, briefly to state that plaintiffs did not, in our opinion, make deliveries of the lumber as rapidly as they undertook to do under the terms of their contract, and that this failure constituted a breach of a condition of the contract. On the other hand, plaintiffs contend that the defendant improperly rejected a large part of the lumber shipped by it in accordance with the terms of the contract, and refused to pay for it, and that this constituted a breach of the contract which entitled them to refuse to go on with it, which they did, and on that ground. To this, defendant replied that if its rejection of a portion of the lumber was a breach at all, which it denied, plaintiffs' breach of the contract in failing to make timely shipments, as it occurred first, enables it to recover therefor.

2021 A 365

LOUISIANA, NEW ORLEANS, LA.
J. M. HARRIS & COMPANY, INC.
Plaintiffs in Error,
vs.
THE HARRIS & WINTER CO.,
Plaintiff in Error.

APPELLATE COURT

NO. 1122

THE APPELLATE COURT delivered the opinion of the court.

The plaintiff in error, hereinafter referred to as the defendant, seeks the reversal of a judgment rendered in favor of the defendant in error, who was hereinafter referred to as plaintiff. The facts briefly stated are that the plaintiff filed suit to recover a balance alleged to be due for lumber shipped defendant under a written contract which called for a cash order payment, and defendant filed a net net claim against the plaintiff on the basis of \$2.00 a thousand feet, on account of plaintiff's failure to ship the balance of the lumber.

It would serve no useful purpose to repeat the substance, and it is sufficient, we believe, briefly to state that plaintiff did not, in our opinion, make delivery of the lumber as rapidly as they undertook to do under the terms of their contract, and that this failure constituted a breach of a condition of the contract. On the other hand, plaintiff contends that the defendant improperly rejected a large part of the lumber shipped by it in accordance with the terms of the contract, and refused to pay for it, and that this constituted a breach of the contract which entitled them to return to an on bill of, to the very day, and so forth. The defendant replied that it is a condition of a contract of sale that the lumber be shipped as rapidly as they undertook to do under the terms of their contract, and that this failure constituted a breach of a condition of the contract. On the other hand, plaintiff contends that the defendant improperly rejected a large part of the lumber shipped by it in accordance with the terms of the contract, and refused to pay for it, and that this constituted a breach of the contract which entitled them to return to an on bill of, to the very day, and so forth. The defendant replied that it is a condition of a contract of sale that the lumber be shipped as rapidly as they undertook to do under the terms of their contract, and that this failure constituted a breach of a condition of the contract. On the other hand, plaintiff contends that the defendant improperly rejected a large part of the lumber shipped by it in accordance with the terms of the contract, and refused to pay for it, and that this constituted a breach of the contract which entitled them to return to an on bill of, to the very day, and so forth.

There is no doubt, of course, that if time was of the essence of this contract, which it may well be contended that it was, defendant would have the right to consider plaintiffs' failure to make timely shipments a sufficient breach of the contract to enable it to treat the contract as at an end, buy lumber in the market, and recover its loss. No such course was, however, followed; on the contrary, the defendant, after plaintiffs' alleged failure to make deliveries, still insisted that the plaintiffs proceed with their contract, which they declined to do on the ground that defendant had already broken the contract by refusing large portions of the shipments made. We are, therefore, of the opinion that if plaintiffs were guilty of a breach of the condition of the contract which required timely shipments, and that that entitled the defendant to treat the contract as at an end, defendant waived that right by insisting that plaintiffs proceed, and that plaintiffs' failure in the matter of making timely shipments, if they did fail, did not, in such circumstances, disable them, if the rejection of the lumber shipped was a breach of the contract which would otherwise entitle them to do so. The matter was properly submitted to the jury, and it, by its verdict, found that defendant was guilty of a breach of the contract which entitled plaintiffs to refuse to proceed with the shipments. It must be noted that defendant's claim of set off was not on account of plaintiffs' failure to make timely shipments, but on account of their refusal to proceed with the remainder of the contract, and the jury, by its verdict, has found that plaintiffs were entitled to refuse to do so. Had defendant presented a set off based wholly upon a failure to make timely shipments, a different question would be presented here. There was no conflict in the testimony as to the fact that when plaintiffs refused to proceed with their contract on the ground of the unjust rejection of the defendant of a portion of the

There is no doubt, of course, that at the time of the
execution of this contract, which it may well be contended that
it was, defendant well knew the right to demand for plaintiff's
failure to make timely shipment a substantial portion of the
contract to enable it to treat the contract as at an end, and
indeed in the event, and recover its loss. In such course,
and, however, believed; on the contrary, the defendant, after
plaintiff's alleged failure to make shipment, still insisted
that the plaintiff's contract with their contract, which they
declined to do on the ground that defendant had already taken
the contract, by retaining large portions of the shipment and
we are, therefore, of the opinion that the plaintiff's
failure to a breach of the condition of the contract which
required timely shipment, and that this would be the
to treat the contract as at an end, defendant gives that
right to insist that plaintiff proceed, and that plaintiff's
failure in the matter of making timely shipment, is that the
will, did not, in such circumstances, stand that, it is
rejection of the timely shipment was a breach of the contract
which would entitle plaintiff to sue for it. The contract was
expressly submitted to the jury, and it is by the verdict, found
that defendant was guilty of a breach of the contract which
entitled plaintiff to recover its money with interest.
It would be noted that defendant's claim of set off was on
account of plaintiff's failure to make timely shipment, and
on account of their refusal to proceed with the shipment of
the contract, and the jury, by its verdict, has found that
plaintiff's were entitled to recover for it, and defendant
received a net net loss wholly upon a failure to make timely
shipment, a different question would be presented, namely, what
was an entitled in the instance as to the fact that when
plaintiff refused to proceed with their shipment on the ground
of the unjust rejection of the shipment in a portion of the

lumber, defendant was at that time insisting on continued performance, and while there was conflict in the evidence as to whether defendant had improperly rejected portions of the shipments made, we are unable to say that the jury's conclusion in regard to this point may be contrary to the manifest weight of the evidence. In this view of the case, no question arises as to whether the contract was severable or entire, for if the defendant was guilty of a breach which entitled the plaintiffs to refuse to proceed, they were entitled to recover for the deliveries already made.

The court's charge to the jury, which was delivered orally, has been criticised by defendant, but upon a careful examination we are unable to say that it is open to criticism in any material particular. The fact that in one portion of the charge, the court said that if the jury believed from the evidence "that the defendant wrongfully and without just cause refused to accept the lumber," instead of a portion of the lumber, is not subject to criticism, since counsel for defendant themselves say there was no dispute between the parties in regard to the amount of lumber that was actually rejected. That portion of the charge, therefore, was in no way misleading. We think the criticism in regard to the portion of the charge which refers to the question of payment for the lumber shipped, is also without merit, since the court merely referred the jury to the contract, and told them that if the defendant refused to pay in accordance with the terms of the contract, then the plaintiffs were justified in refusing to make further shipments thereunder.

In view of these circumstances, the judgment of the Municipal Court is affirmed.

AFFIRMED.

number, defendant was at that time insisting on continued performance, and while there was conflict in the evidence as to whether defendant had improperly protested portions of the shipments made, we are unable to say that the jury's conclusion in regard to this point may be contrary to the weight of the evidence. In this view of the case, no question arises as to whether the contract was severable or entire, for if the defendant was guilty of a breach which entitled the plaintiffs to refuse to proceed, they were entitled to recover for the deliveries already made.

The court's charge to the jury, which was delivered orally, has been criticized by defendant, but upon a careful examination we are unable to say that it is open to criticism in any material particular. The fact that in one portion of the charge, the court said that if the jury believed from the evidence "that the defendant wrongfully and without just cause refused to accept the lumber," instead of a portion of the lumber, is not subject to criticism, since counsel for defendant themselves say there was no dispute between the parties as to the amount of lumber that was actually rejected. That portion of the charge, therefore, was in no way misleading. We think the criticism in regard to the portion of the charge which refers to the question of payment for the lumber shipped, is also without merit, since the court merely referred the jury to the contract, and said that if the defendant refused to pay in accordance with the terms of the contract, then the plaintiffs were justified in refusing to make further shipments thereunder.

In view of these circumstances, the judgment of the Appellate Court is affirmed.

114 - 21504

PERFECTION PULVERIZING MILLS.

A Corporation,

Plaintiff in Error,

vs.

GEORGE E. KEISER,

Defendant in Error.)

203 I.A. 383

ERROR TO

COUNTY COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Plaintiff in error, Perfection Pulverizing Mills, a corporation, (hereinafter designated plaintiff) brought suit against the defendant in error, George E. Keiser, (hereinafter designated defendant) on the common counts for the sum of \$113.51. The defendant pleaded the general issue and gave notice of a set off thereunder in the sum of \$681.13. The jury returned a verdict in favor of the defendant on his set off, assessing his damages at \$495.95, upon which the court entered judgment and the plaintiff thereupon sued out a writ of error to reverse said judgment to vacate and set aside the verdict of the jury and to assess the damages in favor of the plaintiff in the sum of \$113.51.

The plaintiff was in the sugar pulverizing business and did considerable work for the defendant; and its claim is for work done pulverizing various quantities of sugar which were sent to it for that purpose by the defendant. Plaintiff's claim for \$113.51 was practically admitted by all parties which leaves as the sole issue that which arises by reason of the notice of set off filed

2031.A.383

114 - 21500

RECEIVED THE FOLLOWING FROM
A Correspondent

Minneapolis in error

MINN TO

COUNTY CLERK

COURT HOUSE

PROCTOR T. KELSO
Testimony in error

THE FOLLOWING TAKEN FROM THE OPINION OF THE

COURT.

MINNAPOLIS IN ERROR, PROSECUTION PROSECUTING

WILLIS, A CORPORATION, (PROSECUTION DESIGNATED MINNAPOLIS)

PROSECUTIONS WERE AGAINST THE DEFENDANT IN ERROR, PROSECUTION

WILLIS, (PROSECUTION DESIGNATED DEFENDANT) BY THE COURT

COURT FOR THE SUM OF \$115.00. THE DEFENDANT CLAIMED THE

DEFENDANT ISSUED AND GAVE NOTICE OF A SET OFF TO THE

THE SUM OF \$681.15. THE JURY RETURNED A VERDICT IN FAVOR

OF THE DEFENDANT ON HIS SET OFF, ANNOUNCING HIS DAMAGES AS

\$495.68, WHICH WHICH THE COURT ENTERED JUDGMENT AND THE

PLAINTIFF THEREUPON MADE A WRIT OF ERROR TO REVERSE

SAYE JUDGMENT TO REVERSE AND SET ASIDE THE VERDICT OF THE

JURY AND TO ASSURE THE DEFENDANT IN FAVOR OF THE PLAINTIFF

IN THE SUM OF \$115.00.

THE PLAINTIFF WAS IN THE UNDER PROSECUTING

DEFENDANT WAS AID CONSIDERABLE WORK FOR THE DEFENDANT;

AND THE CLAIM IN THE WORK DONE PROSECUTING VARIOUS QUESTIONS

OF THE DEFENDANT WHICH WERE SENT TO HIM FOR THAT PURPOSE BY THE

DEFENDANT. PLAINTIFF'S CLAIM FOR \$115.00 WAS PROSECUTED

ADMITTED BY ALL PARTIES WHICH DEFENDANT AS THE ONLY ISSUE

WHICH WHICH ARISES BY REASON OF THE NOTICE OF SET OFF FILED

by the defendant.

The defendant on March 28, 1914, delivered to the plaintiff 50 barrels of sugar. The plaintiff held the same in original packages until a few days prior to April 4, 1914, at which time at least 44 out of the 50 barrels were dumped into various hoppers and bins and other parts of the machinery to be ground and turned out as powdered sugar. On April 4th a fire occurred in plaintiff's factory and the whole of the fifty barrels, with the exception of six barrels, about which there was some controversy, was destroyed by fire. No claim is made that the fire was caused by the negligence of the plaintiff.

It is claimed by the defendant that in July, 1913, an oral contract was made with the plaintiff, whereby the plaintiff agreed to grind and crush sugar for the defendant at certain fixed prices; that terms were agreed upon in regard to different kinds of sugar and the furnishing of barrels, etc; that the sugar was to be delivered by the defendant to the plaintiff's factory to be ground as, and when, defendant ordered it to be ground; that until an order to grind was given by the defendant, the sugar delivered to the plaintiff was to be left in the original packages at plaintiff's storehouse. The general substance of the oral contract was not denied by the plaintiff but the latter claims that there was not in the oral agreement the provision that the sugar was to be left in the original packages in plaintiff's possession until an order to grind was given to the defendant. It is admitted that the sugar was taken out of the original packages and placed in the hoppers and bins and other parts of the machinery for the purpose of having the same ground into powdered sugar without any special order

by the defendant.

The defendant on March 22, 1912, delivered to the

plaintiff 50 barrels of sugar. The plaintiff held the same in original packages until a few days prior to April 1, 1912, at which time at least 44 out of the 50 barrels were damaged into various fragments and pieces and other parts of the machinery of the ground and turned out as powdered sugar. On April 4th a fire occurred in plaintiff's factory and the whole of the fifty barrels, with the exception of six barrels, about which there was some controversy, was destroyed by fire. He claims to have lost the five barrels by the negligence of the plaintiff.

It is claimed by the defendant that in July,

1912, an oral contract was made with the plaintiff, whereby

the plaintiff agreed to grind and crush sugar for the defendant at certain fixed prices; that terms were entered upon in regard to different kinds of sugar and the turning of barrels, etc; that the sugar was to be delivered by the defendant to the plaintiff's factory to be ground up, and when defendant orders it to be ground; that until an order is given was given by the defendant, the sugar delivered to the plaintiff was to be left in the original packages at plaintiff's storehouse. The general substance of the oral contract was that the plaintiff was to deliver the sugar to the defendant and the defendant was to deliver the sugar to the plaintiff. The sugar was to be left in the original packages in plaintiff's possession until an order to grind was given to the defendant. It is admitted that the sugar was taken out of the original packages and placed in the bags and then the other parts of the machinery for the purpose of having the

or direction from the defendant.

The chief question in the case was one of fact whether it was agreed between the plaintiff and defendant that upon the delivery of the sugar by defendant to plaintiff the latter should pulverize any of it without first receiving an order from the defendant. The case was tried before a jury and the matter submitted to them. The defendant, Keiser, testified that there was such a provision in the contract and his testimony was corroborated by the testimony of Andrew and their testimony was denied by Kay, the witness for the plaintiff. The record discloses a direct conflict, but, at the same time, we are unable to say that there is insufficient evidence to justify a verdict for the defendant. If it was understood and agreed to by both parties that this sugar should not be taken out of the original packages and pulverized only on definite orders from the defendant, then the plaintiff, when, just prior to the fire, it dumped the sugar into the hoppers and bins, without an order to do so from the defendant, was guilty of a breach of the contract, and we do not feel under the circumstances, considering the evidence as it is disclosed in the record, that it would be justifiable to disturb the verdict of the jury.

It is contended by the plaintiff that the damages were ^{un-}liquidated and grew out of a tort or a breach of contract, not connected with the contract sued upon and, therefore, cannot be made the subject of a set off. The defendant gave notice of a set off under the general issue.

or direction from the defendant.

The chief question in the case was one of fact whether it was agreed between the plaintiff and defendant that upon the delivery of the sugar by defendant to plaintiff the latter should purchase any of it without first receiving an order from the defendant. The case was tried before a jury and the matter submitted to them. The defendant, Kaiser, testified that there was such a provision in the contract and his testimony was corroborated by the testimony of Andrew and their testimony was contradicted by Ray, the witness for the plaintiff. The record discloses a direct conflict, but, at the same time, we are unable to say that there is insufficient evidence to justify a verdict for the defendant. It is now understood and agreed to by both parties that this sugar should not be taken out of the original packages and put in various small articles ordered from the defendant, then the plaintiff, when, just prior to the fire, it happened the sugar into the hopper and bins, without an order to do so from the defendant, was guilty of a breach of the contract, and we do not feel and in the circumstances, contradicting the evidence as it is disclosed in the record, that it would be justifiable to disturb the verdict of the jury.

It is contended by the plaintiff that the damage was liquidated and grew out of a tort or a breach of contract, not connected with the contract upon which the defendant cannot be made the subject of a suit will. The defendant gave notice of a suit off under the general issue.

Under those circumstances it was only necessary to state clearly the nature of the claim of set off. The plaintiff's claim was for work done pulverizing sugar for the defendant running over a period of time beginning July, 1913, and pursuant to an oral contract and the defendant's claim was for damages for a breach of one of the terms of that contract. We are compelled to assume that the jury found that the contract provided that the plaintiff was entitled to pulverize the sugar only when it received orders from the defendant; and that the taking of the sugar out of its original packages and putting it in the bins without an order from the defendant was a violation of the terms of the contract and the proximate cause of the loss. From that it follows, therefore, that the plaintiff having sued upon the contract and the defendant having claimed damages for a breach of the same contract, they may be allowed even though unliquidated. Kaskaskia Bridge Co. v. Shannon, 1 Gilman 15; Edwards v. Todd, 1 Scan. 462; South Chicago City Ry. Co. v. Workman, 64 Ill. App. 383; Scudder-Gale Grocer Co. v. Russell, 65 Ill. App. 281.

It is contended by the plaintiff that no demand was made for a return of the sugar. If a demand were necessary in such a case, the testimony of Keiser is sufficient; but where the destruction of the res is admitted by both sides and the theory of the case and the whole trial is based upon the assumption of its loss, a demand, which would be a completely useless act, is unnecessary.

It is contended further by the plaintiff that Keiser, the agent, had no right to make a claim of set off in his own name. It was admitted that Keiser was the duly

Under these circumstances it was only necessary to state clearly the nature of the claim of self aid. The plaintiff's claim was for work done by retaining water for the defendant

running over a period of time beginning July, 1912, and pursuant to an oral contract and the defendant's claim was for damages for a breach of one of the terms of that contract.

We are compelled to assume that the jury found that the contract provided that the plaintiff was entitled to deliver the sugar only when he received orders from the defendant; and that the taking of the sugar out of its original packages and putting it in the bins without an order from the defendant was a violation of the terms of the contract and the proximate cause of the loss. From that it follows, therefore, that the plaintiff having acted upon the contract and the defendant having claimed damages for a breach of the same contract, they may be allowed even though

undischarged. Kaskasie Sugar Co. v. Shannon, 111 Minn 12; Worcester v. Todd, 1 Conn. 482; South Wales v. W. Y. Russell, 64 Ill. App. 293; Worcester-Cole v. Russell, 65 Ill. App. 291.

It is contended by the plaintiff that no damage was made for a return of the sugar. If a damage was necessary in such a case, the theory of the law is sufficient; but where the destination of the rice is admitted by both sides and the theory of the case and the plaintiff is based upon the assumption of the loss, a damage, which would be a completely useless act, is unnecessary.

It is contended further by the plaintiff that Kaiser, the agent, had no right to make a claim of self aid in his own name. It was admitted that Kaiser was the only

authorized agent of B. H. Howell Sons and Company at all times between March 3, 1914 and April, 1914, and we are of the opinion that as the undisclosed agent he had as much right to claim a set off as his principals. Of course the sequel follows, that, having recovered, it then becomes res adjudicata even as to his principals.

Complaint is made by the plaintiff in regard to instruction number five which was given at the request of the defendant. The cases seem to support either theory, that is, damages as the result of negligence arising by reason of a breach of the contract, or damages as the result of a breach of contract. The words "wilful breach" made the instruction somewhat favorable to the plaintiff. The plaintiff complains of the refusal to give instructions 19, 23, 26 and 27. The cause of action in the Municipal court was not between the same parties; the real defendants in that suit were Kay and Lewis and not the plaintiff herein; and the trial judge was therefore justified in refusing the proffered instructions. We have examined the other objections made by the plaintiff to certain instructions which were given, and do not find in view of the evidence any that is unsound.

Finding no material error in the record, the judgment is affirmed.

AFFIRMED.

authorized agent of H. H. Howell Bank and Company at all times between March 3, 1914 and April, 1914, and no part of the opinion that the undersigned agent he had no much right to claim a set off as his principal. Of course the equal failure, that, having recovered, it has become the undersigned even as to his principal.

Conclusion is made by the plaintiff in regard to instruction number five which was given of the request of the defendant. The case seems to support either theory, that is, damages as the result of negligence arising by reason of a breach of the contract, or damages as the result of a breach of contract. The words "willful breach" mean the instruction somewhat favorable to the plaintiff. The plaintiff complains of the refusal to give instructions 18, 23, 25 and 27. The cause of action in the Municipal court was not between the same parties; the two defendants in that suit were Ray and Davis and not the plaintiff herein; and the trial judge was competent to find in refusing the proffered instructions. We have examined the other objections made by the plaintiff to certain instructions which were given, and do not find in view of the evidence any that is warranted.

Finding no material error in the record, the judgment is affirmed.

W. H. H.

178 - 21571

WILLIAM & VASHTI COLLEGE,
a corporation, for use
of Robert L. Watson,

203 I.A. 390

Defendant in Error,

ERROR TO

vs.

MUNICIPAL COURT
OF CHICAGO.

JEFFERSON D. SHATFORD,

Plaintiff in Error.)

MR. JUSTICE TAYLOR delivered the opinion of
the court.

William & Vashti College, a corporation, for
the use of Robert L. Watson, the defendant in error,
(hereinafter designated plaintiff) brought suit in the
Municipal Court against Jefferson D. Shatford, plaintiff
in error (hereinafter designated defendant) to recover
the sum of \$363.35 due the plaintiff from the defendant
for principal and interest on an account stated; and for
board, lodging, tuition and school books furnished to
J. Eric Shatford, the minor son of the defendant, at the
latter's request and upon his promise to pay the same,
being the sum of \$270 for board, lodging and tuition;
\$16.50 for school books and \$26.85 for interest.

The defense set up was that the son of the
defendant was not a minor at the time when the board,
lodging, tuition and school books were furnished to him;
that a college education is not a necessity; that there
was no account stated or contract or promise made by the
defendant to pay for such board, lodging, tuition or
school books.

2031 A. 890

WILLIAM & VERNAL COLLEGE,
INCORPORATED, FOR THE
BY ROBERT L. BROWN,

Defendant in Error,

vs.

WILLIAM & VERNAL COLLEGE,
INCORPORATED,
CHICAGO, ILL.

Plaintiff in Error.

MR. JUSTICE TALKER delivered the opinion of

the court.

William & Vernal College, a corporation, for

the use of Robert L. Brown, the defendant in error,

(hereinafter designated plaintiff) brought suit in the

Federal Court against Jefferson D. Whitford, plaintiff

in error (hereinafter designated defendant) to recover

the sum of \$200.00 and the plaintiff from the defendant

for principal and interest on an account stated; and for

costs, including, revision and actual fees payable to

J. Edgar Whitford, the minor son of the defendant, at the

plaintiff's request and upon his promise to pay the same,

being the sum of \$175 for board, lodging and tuition;

\$10.00 for school books and \$15.00 for interest.

The answer set up was that the son of the

defendant was not a minor at the time when the board,

lodging, tuition and school books were furnished to him;

that a college education is not a necessity; that there

was no account stated or contract of promise made by the

defendant to pay for such board, lodging, tuition or

school books.

The case was tried without a jury and the trial judge found the issues for the plaintiff and against the defendant and entered judgment for the sum of \$286.50 which was the amount claimed by plaintiff to be due for board, lodging, tuition and school books, without interest. The chief question in the case is whether or not the defendant is liable for certain charges made against his son for board, lodging and tuition for the college year which began in the fall of 1910 and ended in the summer of 1911.

J. Eric Shatford, the son, first began attending the college in the fall of 1909 and attended for the balance of that school year ending in June, 1910. The witness Watson testified that the defendant said he had settled for that whole school year. The son attended in all, three years, 1909-1910, 1910-1911, 1911-1912. The defendant denies that his son attended in 1910-1911 with his consent; but he does not deny that he attended in 1909-1910 with his consent and that he, the defendant, paid the expense therefor. Three witnesses, Watson, English (former president of the College) and Judge George A. Cooke (of the Supreme Bench) testified that the defendant stated that his son in 1910-1911 was a minor.

On November 10, 1911, the defendant wrote to Watson, the Treasurer of the plaintiff, a long letter which contains the following:

"As for the old amount they have my assurance of it and I shall send them a cheque for it before very long."

On January 22, 1912, F. C. English, President of the plaintiff wrote the defendant as follows:

The case was tried without a jury and the trial judge found the answer for the plaintiff and awarded the judgment and interest judgment for the sum of \$25,000 which was the amount claimed by plaintiff to be due for board, lodging, tuition and school fees, without interest. The only question is the case is whether or not the defendant is liable for certain charges such as against his son for board, lodging and tuition for the college year which began in the fall of 1911 and ended in the summer of 1911.

1. This statement, the son, first began attending the school in the fall of 1909 and attended for the balance of that school year ending in June, 1910. The witness again testified that the defendant said he had called for that whole school year. The son returned in fall, three years, 1909-1910, 1910-1911, 1911-1912. The defendant denied that his son attended in 1910-1911 with his mother; but he said that day that he attended in 1909-1910 with his mother and that he, the defendant, paid the expense that day. Three witnesses, witness, English (former president of the village) and Judge George A. Cook (of the supreme bench) testified that the defendant stated that his son in 1910-1911 was a school.

which contains the following:

"I am very glad to hear that you are well and hope you will continue to be so for many years to come."

On January 22, 1916, T. C. ...
The following were the ...

"I have your letter of the 20 and in reply will say: Your son Eric received for his summers work \$135 credit on this years tuition and board and his board for the summer. Had he remained in our dormitory there would have been due \$15, on the first half year, but he has left since holidays to board in the hotel and the only bill he will have for the remainder of the school year will be for his books and \$25 tuition. There is due for last year tuition & board.....\$270
Bks..... 16.50
For books this year..... 5.25
And \$25 for the rest of this year

I trust you will favor us with a remittance before Feb. first. I have constant admiration for your son and his progress, and sincerely trust we can have nothing to mar our work in any form."

On January 30, 1912 the defendant answered the latter letter, in part, as follows:

"You will please find enclosed cheque for twenty five dollars for tuition of Eric for balance of this year as claimed by you due, also cheque for \$5.25 for books for this year.

Cheque for the balance due for last year will be forwarded as soon as I reach it which will be in a short time."

The defendant having permitted his son to attend William & Vashti College in 1909-1910 and receive tuition, board and lodging on his own account and then himself, the defendant, having paid for these services without objection, it is a reasonable presumption that the son had authority and was the agent of the father to contract for these services; and considering what the record in this case discloses in regard to the three school years, 1909, 1910 and 1911, and particularly the evidence to the effect that the son was under age at the close of the school year in the summer of 1911; that the defendant had settled for his son's school expenses for the year 1909-1910; that he knew of his son's attendance in 1910-1911; that in the letters above mentioned he ratified what had been done for his son in 1910-1911 and promised

"I have your letter of Jan 30 and in reply will say: You are this receiving for the amount of \$155.00 on this year's tuition and board and his book for the winter. The balance in your account would have been \$15.00 on the 1st of Jan. But we have this balance \$15.00 on credit in the hotel and the only bill we will have for the remainder of the school year will be for his board and \$25 tuition. There is no for your tuition & board..... \$15.00
for this year..... \$15.00
and the rest of this year
I expect you will have us with a remainder before Feb. 1st. I have constant admiration for your man and his integrity, and sincerely trust we can have something to say for him in any form."

On January 30, 1912 the defendant received the latter letter, in part, as follows:

"You will please find enclosed checks for twenty five dollars for tuition of this year and this year we divided by you one, also check for \$15.00 for books for this year. This is for the balance due for last year will be forwarded as soon as I reach it which will be in a short time."

The defendant having received his son to attend William's Varsity College in 1910-1911 and the tuition, board and lodging on his own account and then himself, the defendant, having paid for those services without objection, it is a reasonable presumption that he was not actually and was the agent of the father to contract for those services; and certainly when the record in this case discloses in regard to the father school years, 1909, 1910 and 1911, and particularly the evidence to the effect that the son was under age at the close of the school year in the summer of 1911; that the defendant had written for his son's school expenses for the year 1910-1911; that he knew of his son's attendance in 1910-1911; that in the letters above mentioned he testified what had been done for his son in 1910-1911 and provided

in writing to pay therefor; we are of the opinion that the plaintiff is entitled to claim, and that it is sufficiently proven that he, the defendant, authorized his son to receive the tuition, board and lodging for the year 1910-1911 on his, the defendant's account, and that he is liable to the plaintiff therefor. Murphy v. Ottenheimer, 84 Ill. 39.

Objection was made by the defendant to an allowance by the trial judge for the sum of \$4 for attendance and \$46.18 for mileage taxed as costs.

On October 7, 1914, the defendant served notice on the plaintiff that he would take depositions of E. C. Davis at Stillwater, Minn. at 10 o'clock a.m. on October 30, 1914 before a certain notary public. At the appointed time and place the plaintiff's attorney appeared and, inasmuch as no witness was called for lack of service or other reasons, plaintiff's attorney returned and the charges mentioned in the order of the trial judge were made. The only excuse given by the defendant why the charge should not be allowed is that on October 29, 1914, before the hour of 6 p.m. (which was the day before the time set for the taking of the depositions) the attorneys for the defendant notified the attorneys for the plaintiff that they had been unable to locate the witness at Stillwater, Minn. and would, therefore, be unable to take his desposition there on October 30, 1914. The evidence shows that the notice was too late reasonably to prevent the attorney for the plaintiff making the journey to Stillwater.

We are of the opinion that the trial judge was justified in finding that the defendant was chargeable

in writing to get together; we are at the opinion that
the plaintiff is entitled to relief, and that it is well-
advisedly given that he, the defendant, authorized his son
to receive the witness, board and lodging for two years
1914-1915 on his, the defendant's account, and that he
is liable to the plaintiff therefor. Henry V. Williams.
De 111. 20.

Objection was made by the defendant to the
allowance by the trial judge for the use of 14 for
attendants and \$10.12 for mileage found on account.
On October 7, 1914, the defendant served notice
on the plaintiff that he would take deposition of F. W.
Smith at Bellwater, Ind. at 10 o'clock a.m. on October
20, 1914 before a certain notary public. At the appointed
time and place the plaintiff's attorney appeared and
learned as no witness was called for lack of service or
other reasons, plaintiff's attorney returned and the
order mentioned in the order of the trial judge was
made. The only excuse given by the defendant was the
witness should not be allowed to take on October 20, 1914,
before the hour of 2 p.m. (which was the day before the
time set for the taking of the deposition) the attorney
for the defendant notified the attorney for the plaintiff
that they had been unable to locate the witness at Bell-
water, Ind. and would, therefore, be unable to take his
deposition until on October 30, 1914. The evidence was
that the notice was too late reasonably to prevent him
attorney for the plaintiff making the journey to Bellwater.
He was of the opinion that the trial judge was
justified in finding that the defendant was negligent

with witness fees and mileage.

Finding no material error in the record, the judgment is affirmed.

AFFIRMED.

with witness from one side.

Nothing was material error in the record, the

judgment is affirmed.

APPROVED.

MARIE SLAD, VACLAV SLAD, FRANK SLAD,
LOUIS SLAD, MARY SYKORA, EMIL SLAD,
EMILY SLAD, CHARLES SLAD, and ANTON
SLAD, BESSIE SLAD, JOSEPH SLAD and
ROSIE SLAD, minors, by Marie Slad,
their next friend,

Plaintiffs in Error, ERROR TO

vs.

CIRCUIT COURT,
COOK COUNTY.

FRANK G. HAJICEK,

Defendant in Error.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

On November 19, 1912, the plaintiffs began an
action of trespass on the case in the sum of \$10,000
against the defendant and on January 30, 1915, filed a
declaration containing the common counts and a count on
an account stated. It was then ordered that the plain-
tiffs file a bill of particulars showing in said bill of
particulars their cause of action; and accordingly, on
the same date, the plaintiffs filed a bill of particulars.
The defendant demurred to the declaration and on May 15,
1915, the trial court entered an order sustaining the
demurrer and dismissing the suit at plaintiffs' costs.
The matter is now before us on a writ of error.

The declaration (considering the bill of particu-
lars as a part thereof) contains substantially the follow-
ing allegations:

That on May 27, 1908, Frank Slad, the
husband of Marie Slad, and the father of the
other plaintiffs died intestate, leaving
surviving him the plaintiffs who were his
widow and heirs at law; that prior to Sept-

2081 A. 396

WILLIAM HEAD, VACANT HEAD, BROWN HEAD,
JAMES HEAD, BARRY HEAD, WHITE HEAD,
WILLIAM HEAD, CHAMBER HEAD, and others
HEAD, BROWN HEAD, JAMES HEAD and
WILLIAM HEAD, others, by their heads,
their next friends,

WILLIAM HEAD, BROWN HEAD, WHITE HEAD,

CHAMBER HEAD, and others,

their next friends,

vs.

WILLIAM HEAD, BROWN HEAD, WHITE HEAD,

CHAMBER HEAD, and others,

WILLIAM HEAD, BROWN HEAD, WHITE HEAD,

CHAMBER HEAD, and others,

On November 19, 1912, the plaintiff began an

action of trespass on the case in the sum of \$10,000

against the defendant and on January 24, 1913, filed a

declaration containing the common counts and a count on

an account stated. It was then ordered that the plaintiff

file a bill of particulars showing in said bill of

particulars their cause of action; and accordingly, on

the same date, the plaintiff filed a bill of particulars.

The defendant demurred to the declaration and on May 16,

1913, the trial court entered an order sustaining the

demurrer and dismissing the bill of particulars with

The order is now before us on a writ of error.

The declaration (consolidating the bill of particulars

into one count) contains substantially the following

allegations:

That on May 27, 1912, Frank Head, the
husband of Willie Head, and the father of the
other plaintiffs died intestate, leaving
surviving him the plaintiffs and their
widow and heirs at law; that while so living

ember 1, 1906, the said Frank Slad delivered certain promissory notes to the defendant, upon which notes the defendant collected about \$4,000; that the defendant, who had been managing the real estate and affairs of Frank Slad, collecting interest and paying taxes for him in his life time, received and held the said \$4,000 as the money of the said Frank Slad; that on or about May 1, 1906, the defendant, anticipating the payment of said \$4,000 to him, advanced and paid out of the moneys then in his hands belonging to the said Slad and out of his own funds about \$999.55 in payment of a certain note made by said Frank Slad; that after the payment of said \$4,000 to said defendant the said Frank Slad allowed that amount, or the balance thereof, after the defendant had reimbursed himself for previous outlays and advances, to remain with the said defendant and to be by him invested so as to produce some income for him, Frank Slad; that thereafter, on May 27, 1908, Frank Slad died intestate; that letters of administration upon his estate were issued by the Probate Court of Cook County, Illinois, to the defendant who duly qualified as administrator, but did not inventory the charge to himself, said sum of \$4,000, nor any part thereof, but stated in his inventory that there was no personal property in said estate of Frank Slad; that the defendant personally and individually, and not as administrator of said estate, converted said \$4,000 or the remaining balance thereof to his, the defendant's own use; that because of the death of the said Frank Slad, the evidence of said facts are with the said defendant and accessible to him and not within the knowledge of or accessible to the plaintiffs.

It is contended by the plaintiff that an administrator de bonis non can take and administer only assets not previously administered by his predecessor; that a conversion of assets through a maladministration of them is yet such an administration as will prevent an administrator de bonis non from taking over the administration of such converted assets; and that, therefore, the plaintiffs, upon the face of their declaration and bill of particulars, have a right to recover.

The defendant, Frank Hajicek, is sued individually and not as administrator and the bill of particulars does not show whether he still remains administrator of said

which I, 1900, the said Frank died delivered
certain property under to the defendant, upon
which some of the defendant collected about \$4,000;
that the defendant, who had been married, the
said estate was divided of Frank died, collect-
ing the income and paying taxes for him in his life-
time, received and paid the said \$4,000 on the
money of the said Frank died; that on or about
May 1, 1900, the defendant, anticipating the
payment of said \$4,000 to him, advanced and paid
out of the money then in his hands belonging
to the said Frank died and out of his own funds about
\$100.00 in payment of a certain note made by
said Frank died; that after the payment of said
\$4,000 to said defendant the said Frank died
allowed that amount, or the balance thereof,
after the defendant had reimbursed himself for
previous advances and expenses, to remain with
the said defendant and to be by him converted so
as to produce some income for him, Frank died;
that thereafter, on May 27, 1900, Frank died
died intestate; that letters of administration
upon his estate were issued by the Probate Court
of Cook County, Illinois, to the defendant who
fully qualified as administrator, but did not re-
ceive the money to himself, and was of \$4,000,
nor any part thereof, but stated in his inventory
that there was no personal property in said estate
of Frank died; that the defendant personally and
individually, and not as administrator of said
estate, converted said \$4,000 on the remaining
balance thereof to his, the defendant's own use;
that because of the death of the said Frank died,
the evidence of said facts are with the said de-
fendant and accessible to him and not within the
knowledge of or accessible to the plaintiff.

It is requested by the plaintiff that an

administrator be appointed who can take and administer only
assets not previously administered by his predecessor;
that a corporation of lawyers should be appointed
of whom it yet good an administration be will proceed
an administrator for the said man (now going over the adminis-
tration of said deceased estate; and that, therefore, the
plaintiff, upon the facts of their declaration and bill of
particulars, have a right to recover.

The defendant, Frank died, is an individual,
and not a corporation and the bill of particulars does
not show whether he still remains administrator of said

estate or had been discharged; it alleges his appointment, but does not state whether or not that appointment has been revoked; whether or not he has filed his final account and had it approved and the estate declared settled. None of these matters are determinable from the face of the bill of particulars. For aught that appears the defendant is still subject as administrator to the jurisdiction of the Probate Court and the question raised by the plaintiff in error, as to the rights of a prospective administrator de bonis non, does not seem to be involved. The defendant in error in his brief volunteers the statement that the appointment of the defendant as administrator has not been revoked and that his final account has been approved and the estate declared settled. Those facts, however, are not set up in the declaration or the bill of particulars and cannot be considered by this court in determining whether the demurrer should have been sustained to the declaration. The fund herein sued for is personal property which is liable to all the debts due from the deceased and, therefore, as personal property, should be administered by the Probate Court. Elder v. Whittemore, 51 Ill. App. 668; Goodman v. Kopperl, 169 Ill. 136; Waterman v. Alden, 42 Ill. App. 294.

If the defendant personally had in his possession money belonging to the deceased or was personally a debtor of the deceased and subsequently became administrator of the estate of the deceased and failed to charge himself personally with that account in his inventory as administrator, it would seem to be reasonable in case an administrator de bonis non were appointed, to consider the personal obligation of the defendant to the deceased as newly dis-

estate or had been discharged; it alleges the appointment
has been made without or not that appointment has been
revoked; whether or not he has filed his final account and
had it approved and the estate declared settled. None of
these matters are determinable from the face of the bill or
particulars. For aught that appears the defendant is still
subject as administrator to the jurisdiction of the Probate
Court and the objection raised by the plaintiff in error,
as to the right of a prospective administrator de bonis non,
does not seem to be involved. The defendant in error in
his brief volunteers the statement that the appointment of
the defendant as administrator has not been revoked and that
his final account has been approved and the estate declared
settled. Those facts, however, are not set up in the de-
claration or the bill of particulars and cannot be consid-
ered by this court in determining whether the error should
have been sustained to the declaration. The facts herein
arise for the personal property which is liable to all the
debts due from the deceased and, therefore, as personal
property, should be administered by the Probate Court.
Wheeler v. Wheeler, 51 Ill. App. 608; Goodman v. Goodman,
109 Ill. 126; Wheeler v. Wheeler, 51 Ill. App. 604.
If the defendant personally had in his possession
money belonging to the deceased or was personally a debtor
of the deceased and subsequently became administrator of
the estate of the deceased and failed to charge himself
personally with that account in his inventory as adminis-
trator, it would seem to be reasonable in case an administra-
tor de bonis non were appointed, to consider the personal
obligation of the defendant to the deceased as newly dis-

covered assets. Chap. 3, Sec. 70 Hurd's Statutes. That, however, does not seem to be involved here, considering the present state of the record. It does not appear from what the plaintiffs have set forth but that they can obtain ample relief in the Probate Court. Considering the facts as set forth in the declaration and bill of particulars, there is nothing to prevent the plaintiffs in error from filing a petition in the Probate Court, asking that court to act as to the alleged debt of the defendant to the estate of which he is administrator; and if he has already been discharged he may be cited in and the Probate Court asked to vacate the order approving his final account, and permitting the plaintiffs to make apt objections thereto. Anderson v. Patty, 168 Ill. App. 151; Platt v. Williams, 175 Ill. App. 1. If the Probate Court then removed the defendant as administrator, an administrator de bonis non could be appointed, who would proceed to recover from the defendant what he might be shown personally to owe the deceased; and it would then be within the jurisdiction of the Probate court. Heppe v. Szczepauske, 209 Ill. 98; Atherton v. Hughes, 156 Ill. App. 215.

We are of the opinion that the Probate Court, having taken jurisdiction of the estate of the deceased, and still retaining that jurisdiction (which we assume from the allegations of the declaration and bill of particulars), has exclusive jurisdiction and that this suit at law cannot be maintained. Elder v. Whittemore, (supra); Goodman v. Kopperl, (supra); Waterman v. Elder, (supra); Strauss v. Phillips, 189 Ill. 9.

Finding no material error in the record the judgment is affirmed.

AFFIRMED.

covered assets. Chap. 3, Sec. 70 New York's Statutes. That, however, does not seem to be involved here, considering the present state of the record. It does not appear from what the plaintiffs have set forth but that they can do - claim ample relief in the Probate Court. Considering the facts as set forth in the declaration and bill of particulars, there is nothing to prevent the plaintiffs in error from filing a petition in the Probate Court, asking that court to act as to the alleged debt of the defendant to the estate of which he is administrator; and if he has already been discharged he may be cited in and the Probate Court asked to vacate the order approving his final account, and permitting the plaintiffs to make any objections thereto. Anderson v. Feltz, 108 Ill. App. 1st 131; Wright v. Williams, 175 Ill. App. 1st 12. If the Probate Court then removed the defendant as administrator, and administered the estate, he could be appointed, and would proceed to recover from the defendant what he might be shown personally to owe the deceased; and it would then be within the jurisdiction of the Probate Court. Hughes v. Huggins, 206 Ill. 93; Anderson v. Hughes, 108 Ill. App. 2d 315.

We are of the opinion that the Probate Court, having taken jurisdiction of the estate of the deceased, and still retaining that jurisdiction (which we assume from the allegations of the declaration and bill of particulars), has exclusive jurisdiction and that this suit at law cannot be maintained. Wright v. Williams (supra); Johnson v. Koppert, (same); Anderson v. Wright (same); Stevens v. Williams, 108 Ill. 9.

Finding no material error in the record the

judgment is affirmed.

ATTORNEYS.

HODGES FIBER CARPET CO.,
(a corp.),

Defendant in Error,

vs.

THE HUGRO MANUFACTURING CO.,
(a corp.),

Plaintiff in Error.

2496
203 I.A. 404

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

When this case was called for trial below counsel for defendant moved to suppress certain depositions that plaintiff offered in evidence. The motion was denied, the depositions were received in evidence and the court based its finding thereon and entered judgment for the plaintiff.

The depositions were taken in New York City. The notice designated May 18th as the time but they were taken May 25th, 1914. Whether there was a continuance or not does not appear. But it was held in Indiana, etc. Ry. Co. vs. Wilson, 77 Ill. App. 603, that the failure of the certificate of the notary, before whom the depositions were taken, to show an adjournment is a mere irregularity which in the absence of any evidence tending to show that one of the parties was injured or surprised thereby is not sufficient to warrant the suppression of the depositions. No injury or surprise was shown in the instant case unless defendant's counsel failed to receive notice of the taking of the depositions. But the court held, and properly we think, that the notice was received.

2081.A.404

THE ENDOGENOUS FACTOR CO.,
(a corp.)

Defendant in error

vs.

vs.

THE ENDOGENOUS FACTOR CO.,
(a corp.)

Plaintiff in error

ON COMPLAINT
RETURNED TO
FILED

INVESTIGATION OF THE FACTS
RELEVANT TO THE CASE

When this case was called for trial before Judge
and the defendant moved for a continuance on the ground
that plaintiff offered in evidence. The motion was
denied. The deposition was received in evidence and the
jury found in favor of the plaintiff and awarded judgment for
the plaintiff.

The deposition was taken in New York City.
The notice designated the date and time for the taking
taken May 28th, 1914. Notice there was a continuance
or not does not appear. But it was held in Illinois, etc.
Ill. Ct. vs. Illinois, 27 Ill. App. 2d, 1914, 1915
of the constitution of the state, before the taking
taken were taken, to show an agreement is a fact
irregularly with the law and the fact of the taking
to show that the fact was taken in violation of the
thereby is not sufficient to warrant the admission of
the deposition. No injury or damage was shown in the
instant case unless the court failed to receive
notice of the taking of the deposition. But the court
held, and properly so held, that the notice was received.

The depositions were filed within a week after they were taken. Nearly six months elapsed before the case was called for trial. It was the duty of defendant's counsel, having received notice of the taking of the depositions, to ascertain whether they had been returned and to present his motion to suppress before the case was called for trial. It was too late to make the motion at that time. (I. C. R. R. Co. vs. Foulks, 191 Ill. 57.) The motion was, therefore, properly denied, and as there was sufficient competent evidence in the depositions to support the judgment, it should be affirmed.

AFFIRMED.

The deposition was filed within a week after

they were taken. Nearly six months elapsed before the

case was called for trial. It was the duty of defendant's

counsel, having received notice of the taking of the

depositions, to ascertain whether they had been retained

and to present his motion to suppress before the case was

called for trial. It was too late to make the motion at

that time. (1. C. R. v. 10. vs. 101, 111, 115.)

The motion was, therefore, properly denied, and no error

was sustained. Defendant's motion to suppress should be

sustained. The judgment, it should be corrected.

REVIEW.

203 I.A. 410

JOHN F. DEVINE, Administrator
of the Estate of Hilda E. Hillman,
Deceased,

Appellee.

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee's intestate was struck down and killed in her attempt to cross in front of a moving street car after passing from behind another on a parallel track five feet away. Appellant, the street car company, urges a reversal of the judgment on the ground, among others, that there was no proof of the exercise of ordinary care by the deceased for her own safety, a view the record compels us to take.

The accident took place in Chicago at the intersection of three streets, 73rd Street running due east and west, Ellis Avenue running into it at right angles from the north but not across it, and South Chicago Avenue running northwest and southeast across 73rd Street at its junction with Ellis Avenue. The street car line was on South Chicago Avenue. The car behind which deceased passed was on the east track going northwest, and the car that struck her was on the west track moving southeast. The former had stopped on the north side of 73rd Street to take on a passenger, Mrs. Peterson, whom Mrs. Hillman, the deceased, had accompanied from the south side of 73rd Street. Several of appellee's

2031.A.410

John J. ...
of the ...
Decided,

Appellee,

vs.

CHICAGO CITY ...
Appellant.

CHICAGO CITY

CHICAGO CITY

CHICAGO CITY

CHICAGO CITY ...
CHICAGO CITY ...

Appellee's ... was struck down and killed

in her attempt to cross in front of a moving street car

after passing from behind another on a parallel track five

feet away. Appellant, the street car company, urges a

reversal of the judgment on the ground, among others, that

there was no proof of the existence of ordinary care by the

defendant for her own safety, a view the record shows us to

take.

The collision took place in Chicago at the inter-

section of ... street, ...

west, ... street running ...

the north and ... street, ...

northwest and ... street ...

with ... street. The street car line was on ...

street. The car ... which ...

street ... street, ...

west track ... street. The ...

north side of ... street in ...

Chicago, when ... street, ...

from the south side of ... street.

witnesses followed them to take the same car but it started up before any of them except Mrs. Peterson boarded it. Mrs. Hillman bade her good-bye near the car, intending to go west on 73rd Street. She was familiar with the locality and the passing of cars there. Immediately after the car started up she walked from behind it to the other track and was struck down when she reached about the middle of said track and then was carried on the car fender to near the middle of 73rd Street where the car stopped.

From the middle of one track to the middle of the other was between eight and nine feet. Her position immediately behind the north bound car when she started towards the west track prevented her from seeing the other car, and the motorman thereon from seeing her until the movement of the two cars brought her and the motorman in a line of unobstructed vision. The motorman said she was then about in the middle of the east track, and about fifteen feet from him. The evidence tends to show that the car stopped from thirty-five to forty feet away, as soon as a car running eight miles an hour could ordinarily be stopped. The deceased was accompanied by two of her children, one five and the other thirteen years old. The former "skipped" over ahead of the car, and the other was thrown back to the east of it without injury.

Plaintiff's evidence was directed mainly to the speed of the car and failure to give a warning. But it is unnecessary to discuss the question of defendant's negligence in the absence of plaintiff's failure to prove the exercise of ordinary care by the deceased for her own safety. It was incumbent on plaintiff to make such proof and without it recovery cannot be had. (Newell v. C. C. C. & St. L. Ry. Co.,

261 Ill. 505.) There was no direct proof of the exercise of such care and the circumstances were not such as to supply it. On the contrary the proof supports the opposite conclusion. If she ought to have looked under the circumstances, as we think, and could have seen the car had she looked, as the evidence shows, for it was well lighted and the night was clear, and then failed to look as is also manifest from the evidence, then she must be deemed to have been guilty of negligence in fact. While the accidents arising from such a situation are frequent and deplorable, yet it is deemed negligence in fact for a party in passing from behind one street car that necessarily obstructs his vision of one approaching from an opposite direction on an adjacent parallel track, to attempt to cross the latter's track without first looking to see whether there is a car so approaching, when in the ordinary course of affairs one may be there. The cases so holding are numerous. There being no ground for distinction between them and the case at bar on this question, it is enough to refer to them without discussion. (Von Holland v. C. & N. Ry. Co., 148 Ill. App. 320; Burke v. Same, 153 id. 388; Brown v. Same, 155 id. 434; Healy v. Same, 167 id. 524; Binder v. Same, 175 id. 503; Ohnersorge v. Same, 177 id. 134; Porter v. Same, 187 id. 28; Casey v. Same, 191 id. 74.)

Several of plaintiff's witnesses were only a few feet away from deceased and saw her when she walked from one track into the other. Their description of her movements indicate that she neither hurried nor drew back from the time she emerged from behind one car until struck by the other, and that she did not look towards the approaching car. Appellee argues from certain evidence that her back

ALL THE (S.S.) WERE NOT AT THE EXHIBITION

OF THE CASE AND THE CIRCUMSTANCES WERE NOT SUCH AS TO

MAKE IT. ON THE OTHER HAND THE FACTS WERE THE OPPOSITE

OF THOSE. IT WAS NOT TO HAVE BEEN UNDER THE CIRCUM-

STANCES, AS WE THINK, AND WE HAVE BEEN THE ONLY ONE

LOOKED, AS THE WITNESS WOULD, FOR IT WAS WELL KNOWN AND

THE NIGHT WAS DARK, AND THEN TRYING TO LOOK AS IF ALSO

MANIFEST FROM THE EVIDENCE, THEN AND THAT HE WOULD TO HAVE

BEEN ABILITY OF NEGLIGENCE IN THAT. WHILE THE ACCIDENTS

EXISTING FROM SUCH A SITUATION AND FREQUENT AND UNDESIRABLE

AND IT IS BEING. ALTHOUGH IN THAT THE WITNESS IS BEING

FROM BEHIND ONE WOULD NOT HAVE BEEN NECESSARILY OBSCURED HIS

VIEWS OF ONE APPROACHING FROM AN OPPOSITE DIRECTION ON AN

SECTION OF RAILROAD TRACK, TO ATTEMPT TO CROSS THE LATTER'S TRACK

WITHOUT FIRST LOOKING TO SEE WHETHER THERE IS A CAR ON

THE TRACK, THEN IN THE ORDINARY COURSE OF A REASONABLE

MAN BEING THERE. THE COURT IS HOLDING THE SAME THING. THERE

BEFORE BE GIVEN FOR DISTINCTION BETWEEN THEM AND THE COURT AT

THE COURT IN THIS QUESTION, IT IS NECESSARY TO REFER TO THEM ALTHOUGH

DISCUSSION. (THE WITNESS V. THE COURT, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

REVEREND OF DISTRICT'S ATTORNEY WERE ONLY A FEW

LAST WEEK THAT WERE NOT AND NEW HAD BEEN THE WITNESS FROM ONE

FROM INTO THE OTHER. THEIR IDENTIFICATION BY THE WITNESS

INDICATES THAT ONE WITNESS HAD NOT BEEN WITH THE OTHER

TIME SHE ARRIVED FROM BEHIND ONE CAR UNTIL STRUCK BY THE

OTHER, AND THAT SHE DID NOT LOOK TOWARD THE APPROACHING

ONE. WITNESS AGREES THAT CERTAIN WITNESS THAT HER BACK

was towards the latter, and that she was going southward to reach the north sidewalk of 73rd Street to go west thereon. While we think the weight of the evidence is that she moved only a few feet and almost directly over after leaving the east track before reaching the west track, yet the farther she went to the southward the greater was her opportunity to see the approaching car on the other track. Plaintiff's theory of her exercising due care is not aided by his construction of the evidence. He made no attempt to examine his witnesses on the subject of looking out for such car. On the contrary we find that on cross examination, one of them said "she walked right ahead without looking", another said, "I didn't see her do anything except walk right straight ahead at an ordinary walk, right up to the instant the car struck her; and I didn't see her look towards the car or look in either direction," and another said "just about the instant she was hit I did see her look towards the car. It was too late then, of course." In view of such evidence and the absence of any direct or circumstantial proof of the exercise of care by deceased for her own safety, it was error to deny the motion for a directed verdict for defendant made at the close of plaintiff's case. As there was no evidence subsequently given that supplied this deficiency, it is incumbent on us to reverse the judgment with a finding of fact.

If it could possibly be said that she had the right to rely on her sense of hearing, still we think that the negative testimony of certain witnesses that they heard no gong, is unavailing against the clear and positive testimony that the gong was sounded. (Brown v. C. C. Ry. Co., supra.)

REVERSED WITH FINDING OF FACT.

was towards the left, and that she was being carried
to reach the horse side of the truck in a way
thereon. This is what the weight of the evidence is
that she moved only a few feet and almost directly over
after leaving the seat truck before reaching the rear truck.
Yet the fact that she went to the seat truck and the greater was
her opportunity to see the approaching car on the other
truck. Witness's theory of her seeing the car in
not aided by his observation of the evidence. In this
no effort to examine his witness on the subject of look-
ing out for such car. In the contrary we find that on
cross examination, one of them said she walked right ahead
without looking, another said, "I didn't see her go any-
thing, except walk right straight ahead of me without a look,
right up to the instant she was struck by; and I didn't
see her look towards the car or look in either direction."
and another said "Just about the instant she was hit I did
see her look towards the car. It was too late then, of
course." In view of such evidence and the absence of any
direct or circumstantial proof of the existence of car by
looked for her car safety, it was error to take the action
for a directed verdict for defendant as a matter of law or
plaintiff's case. There was no evidence whatsoever
given that implied any delinquency, it is important to us
to reverse the judgment with a finding of fact.
It is quite possibly we said that was not the
right to rely on her sense of hearing, still we think that
the negative testimony of certain witnesses that they heard
no sound, is material against the clear and positive
testimony that the car was sounded. (Brown v. E. A. N. Y.

540 - 21938

FINDING OF FACT.

We find that the deceased, Hilda E. Hillman, was guilty of negligence that contributed to her injury and death.

440 - 11200

RECORD OF CASES

as filed with the Secretary, Nilda L. Williams,
and Justice.

585 - 21983

GERTRUDE L. EMERSON,
Appellee,

vs.

CHICAGO CITY RAILWAY
COMPANY,
Appellant.

203 I.A. 412

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Gertrude Emerson, the plaintiff, was injured while alighting from one of appellant's street cars on which she was a passenger, and in this suit recovered a judgment on account of her injuries for \$5000, after a remittitur of \$500.

It is urged that the verdict was against the weight of the evidence, that improper evidence was admitted, and that the damages are excessive.

The declaration is predicated on two theories of negligence, (1) in starting the car while plaintiff was attempting to alight therefrom, and (2) in permitting a metal strip on the rear step of the car to be in a loose and unsafe condition whereby the heel of plaintiff's shoe was caught under it, causing her to be thrown therefrom into the street.

Besides herself, plaintiff produced three witnesses of the occurrence, two of whom first saw her after she had fallen from the step, and one as she fell. Defendant's two witnesses to the occurrence, the conductor and one of its investigators, testified that the car was stand-

2081.A.418

WILLIAM T. BROWN
SUPERVISOR
CITY OF CHICAGO

CHICAGO CITY RAILWAY
CHICAGO, ILL.
JANUARY 1, 1900

RECEIVED
JANUARY 1, 1900

For the purpose of this report, the following facts are set forth: That on the morning of January 1, 1900, at about 8:30 a.m., a passenger car of the Chicago City Railway, which was being operated by a driver named John J. Brown, was passing through the intersection of the Chicago River and the Chicago City Railway tracks, when it was struck by a car of the Chicago City Railway, which was being operated by a driver named John J. Brown.

It is stated that the driver of the car which was struck, John J. Brown, was at the time of the accident, and that the driver of the car which struck it, John J. Brown, was also at the time of the accident.

The driver of the car which was struck, John J. Brown, was at the time of the accident, and that the driver of the car which struck it, John J. Brown, was also at the time of the accident.

It is stated that the driver of the car which was struck, John J. Brown, was at the time of the accident, and that the driver of the car which struck it, John J. Brown, was also at the time of the accident.

It is stated that the driver of the car which was struck, John J. Brown, was at the time of the accident, and that the driver of the car which struck it, John J. Brown, was also at the time of the accident.

It is stated that the driver of the car which was struck, John J. Brown, was at the time of the accident, and that the driver of the car which struck it, John J. Brown, was also at the time of the accident.

ing still at the time plaintiff fell. She alone testified that the car started up at the time with a jerk, and she has some corroboration in the admitted fact that the conductor gave a stop signal after she fell and immediately before it a signal to start. The element of credibility enters into the question, and we cannot say that if the verdict was based on the theory that she fell because the car gave a jerk when she was attempting to alight, it is manifestly against the weight of the evidence. Such a jerk following from a starting and almost immediate stopping of the car, in obedience to the signals given, may have been imperceptible to the only two witnesses away from the car who saw her fall, one plaintiff's and one defendant's, and yet have been sufficient to cause the accident.

As to the condition of the metal on the step the testimony was again conflicting, plaintiff's three witnesses testifying that they examined the step immediately after the accident and found the metal plate loose, so that pressure on the outer edge of it raised up the inner edge, from a quarter to a half inch, and three of defendant's employees testifying, one who examined it with one of plaintiff's witnesses, and two who examined it after the car reached the barn without opportunity for repair, that the metal plate was tight. We are unable to say which set of witnesses was the most reliable. The jury was better able to decide that than ourselves. Surely we cannot say the verdict, if based on ^{the} theory that the heel of her shoe caught on the back of a loose plate, is manifestly against the weight of the evidence. Whichever theory of fact the jury adopted we find no warrant in the record for holding that the weight of the evidence is manifestly against it.

the fall of the time plaintiff fell. The above testified that the car started up at the time with a jerk, and the man some corroboration in the admitted fact that the conductor gave a step signal after the fall and immediately before it a signal to start. The amount of credibly before into the question, and we cannot say that it the verdict was based on the theory that the fall because the car gave a jerk when she was attempting to alight, it is manifestly against the weight of the evidence. Such a jerk following from a starting and almost immediate stopping of the car, in obedience to the signals given, may have been imperceptible to the only two witnesses away from the car who saw her fall, one plaintiff's and one defendant's, and yet have been sufficient to cause the accident.

As to the condition of the metal on the step the testimony was again conflicting. Plaintiff's three witnesses testified that they examined the step immediately after the accident and found the metal glass loose, no that pressure on the outer edge of it raised up the inner edge, from a quarter to a half inch, and three of defendant's employees testified, one who examined it with one of plaintiff's witnesses, and two who examined it after the car returned the data with it opportunity for repair, that the metal plate was tight. It was unable to say which set of witnesses was the more reliable. The jury was better able to decide that than ourselves. Surely we cannot say the verdict, if based on ^{the} only fact that the hole in her shoe caused her to break off a loose plate, is manifestly against the weight of the evidence. And never likely of fact the jury reached we find no warrant in the record for holding that the weight of the evidence is manifestly against it.

Complaint is made against permitting one of plaintiff's witnesses to testify that right after the accident he put his heel on the step to see if it would catch on the plate, and it did. Defendant moved to strike out the evidence on the ground that it was an experiment on conditions not identical with those described in the occurrence. The witness said on cross examination that he stood with one foot on the ground and "the other as a person would be in stepping off, that is, facing out from the car" and that his heel so caught. We do not think that such circumstance, in view of other testimony showing that the width of the step was eleven inches and that the metal plate was four inches wide and flush with the step from its outer edge, and raised up on the inner side under pressure from the outer edge, is so dissimilar from the occurrence of plaintiff's stepping off as described by her, whatever the size or shape of her shoe, that such evidence is repugnant to the rule invoked against allowing proof of experiments. She weighed about two hundred pounds and the heel of her shoe came off. It was her remark that she caught it on the step that led to the examination of the step. It is possible, of course, that her foot may have slipped off the step and her heel caught on its edge. The conductor gave a description of the accident from which such an inference might be drawn. But it is argued with some force that from his position he could not tell whether her heel caught on the edge of the step or back on the plate. He didn't examine the plate. We cannot disturb the judgment on account of the admission of such evidence.

But we think the judgment is somewhat excessive and should be reduced \$1000. She had a fractured leg,

Comparison is made against preceding one of
 Plaintiff's witness to testify that right after the
 defendant he put his head on the step to see if it would
 catch on the step, and it did. Defendant moved to strike
 out the evidence on the ground that it was an experiment;
 on examination not admitted with those recorded in the
 occurrence. The witness said in direct examination that
 he stood with one foot on the ground and "the other on
 a person would be in stepping off, that is, leaning out
 from the car" and that his head on the step. He does not think
 that such circumstances, in view of other testimony, show
 that the side of the step was eleven inches and that
 the metal plate was four inches wide and flush with the
 step from its outer edge, and raised up on the inner side
 under pressure from the outer edge, is so dissimilar from
 the occurrence of Plaintiff's stepping off as described
 by her, whereas the step or ledge of her shoe, that being
 evidence is relevant to the issue involved against Plaintiff
 question of experiment. The weight of the evidence
 weighs and the head of her shoe came off. It was not pos-
 sible that the weight of her shoe was so great
 as to cause the step. It is possible, of course, that
 her foot may have slipped off the step and her head caught on
 its edge. The witnesses have a description of the accident
 from which some information might be drawn. That it is
 agreed with facts that from his position he could not
 tell whether his head caught on the edge of the step or
 back on the plate. He didn't examine the plate. He cannot
 discuss the judgment as to what of the location of the
 evidence.
 But we follow the judgment in previous cases
 and should be reversed 1900. See also a transcript of

suffered considerable pain, and was laid up for practically six months, and there was some evidence that she had an ankylosed condition. But neither her future ability to get about without artificial aid nor her earning capacity appears to be so reduced as to justify such a large judgment. If therefore appellee will within ten days remit \$1000 the judgment will be affirmed. Otherwise it will be reversed and the cause remanded.

AFFIRMED WITH A REMITTITUR.

203 I.A. 414

AUGUSTA LEHMANN et al.,
Appellees,

vs.

CITY OF CHICAGO,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The only question in this case is whether the City of Chicago is liable for rent of certain premises for the months of March, April and May, 1911, all other questions having been eliminated from the record by agreement.

The premises were used for the City's administrative offices, and the lease therefor was duly authorized and ran from June 1, 1908 to June 1, 1910, and gave the privilege of renewal for an additional year, provided the lessee, the City, gave six months' notice of its desire for such renewal. None was given. But in November, 1909, evidently in expectation that the city would move into its new City Hall before June 1, 1911, and have no further use for the premises after so moving, Walter H. Wilson, who as city comptroller was authorized to execute leases for the City, held a conversation with the lessors' agent on the subject of extending the lease to March 1, instead of June 1, 1911. He claimed, and the agent denied, that a verbal agreement for such extension was then made. While the comptroller's version of the conversation was corroborated by his deputy, subsequent facts tend strongly to refute it.

2081.4.414

1891 - 1892

WYOMING
COUNTY
WYOMING

COUNTY CLERK
WYOMING
WYOMING
WYOMING

WYOMING
COUNTY CLERK

The only question in this case is whether the
City of Chicago is liable for rent of certain premises
for the months of March, April and May, 1911, all other
questions having been eliminated from the record by
agreement.

The premises were used for the City's adminis-
trative offices, and the lease therefor was duly authorized
and ran from June 1, 1908 to June 1, 1910, and gave the
privilege of renewal for an additional year, provided the
lease, the City, gave six months' notice of its desire to
renew. This was given, but in November, 1909,
without its expectation that the City would renew the
new City Hall before June 1, 1911, and have no further use
for the premises after so moving, before it moved, who as
the City Corporation was authorized to exercise power for the
City, had a conversation with the landlord, and on the
subject of extending the lease to June 1, instead of June
1, 1911. He agreed, and the record shows that a verbal
agreement for such extension was then made. Will the
corporation's version of this conversation be controverted
by its agents, independent facts tend strongly to sustain it.

On the 30th of the same month, a few days after the conversation, the comptroller wrote the agent, saying, "We accept your proposition * * * and would be pleased to have you prepare and submit a form of agreement extending the lease" (to March 1, 1911.) The agent wrote on the bottom of it, "I can not accept the above" and immediately returned it. The letter clearly imports a present and not a past acceptance by the City of an alleged proposition. The comptroller, however, on its return, wrote a second letter indicating a change of view on that subject, saying,

"You seem to be laboring under misapprehension of the facts. We have not made any proposition, but we *did* (italics ours) accept the proposition you submit, -- that is," etc; * * * "and we would be pleased to have you prepare and submit a form of agreement" etc.

To add to the manifest inconsistency of these letters both the comptroller and his deputy testified at the trial that the proposition referred to emanated from the comptroller and not from the agent, -- the precise position then taken by the agent. For on December 1, (the following day) Smith & Wallace, Attorneys, purporting to speak for the agent, wrote to the comptroller, expressly disavowing the agent's making either a proposition or an agreement. The letter also said that as the City had not given notice of its desire for the extension provided for in the lease it would be expected to surrender possession of the premises June 1, 1910. Of course, such a notice, if authorized, was not required by law, and superfluous for the lease expired at that time by its terms. It amounted, therefore, to a mere reminder of the legal effect of the lease, and had no bearing on the character of the tenure after the lease expired if the landlord assented to the holding over.

In the town of the same name, a few days after the completion, the controller wrote the agent, saying, "The agent's proposal is a good one and would be allowed to have your proposal and submit a form of agreement containing the same" (to March 1, 1911). The agent wrote on the bottom of it, "I can not accept the above and I definitely returned it. The latter clearly indicates a promise and not a mere acceptance by the City of an alleged proposition. The controller, however, on the return, wrote a second letter indicating a change of view on that subject, saying, "You seem to be laboring under a misapprehension of the facts. To have any proposal, but as the latter was not the proposition, you must, -- and it is, -- and we would be pleased to have you prepare and submit a form of agreement, etc."

To add to the manifest inconsistency of these letters both the controller and his deputy testified at the trial that the proposition referred to emanated from the controller and not from the agent. -- The precise position then taken by the agent. For on December 1, (the following day) with a witness, according to whom the agent, wrote to the controller, whereby disclosing the agent's writing either a proposition or an agreement. The letter also said that the City had not given notice of its desire for the extension involved for in the letter it said as indicated in a former position of the controller, dated 1, 1910. Of course, with a witness, it was not denied by him, and was taken for the fact, as it was stated by the letter. It was, therefore, to a very reminder of the agent's letter of the facts, and had no bearing on the character of the same after the same applied to the latter's letter to the latter's agent.

(2 Tiffany on Land. & Ten. 1461; Secor vs. Pestana, 37 Ill. 525; Clapp vs. Noble, 84 id. 62.) While, however, appellant's principal contentions are predicated either on said oral agreement or on said notice yet it made no proof of authority to bind lessors in respect to either. That the agent had authority to make a new agreement, or that Smith & Wallace were authorized to write such letter in behalf of the lessors is left wholly to conjecture.

But even had there been proof of authority in both instances, the defenses predicated thereon would fail because of the preponderance of evidence against the existence of an oral agreement and because said notice, if it be so construed, was waived.

The City made no reply to the letter of December 1st. Its attitude was that of accepting the disavowal of an oral agreement and regarding the matter as a closed incident. Not before the City vacated the premises in March, 1911, was any allusion made to either such agreement or such notice. After the expiration of the lease June 1, 1910, it continued to remain in possession of the premises, paying on demand at the beginning of each month the rent stipulated for in the lease, practically conforming to its terms in every respect except that no rent was paid after Dec. 1, 1911. The obligation to pay rent for three months thereafter was not questioned, the comptroller saying on demand therefor that he "was not ready to pay". Warrants therefor were issued but not delivered. In no other respect were conditions changed from what they had been during the entire tenancy until the City began to move from the premises in February, 1911.

All the facts, including the conduct of the parties

to the lease, were consistent with a holding over on the terms of the lease without a new agreement. By accepting payment of the monthly rent after the expiration of the lease according to its terms the landlord elected to treat the City as a tenant from year to year. (Eppstein vs. Kuhn, 225 id. 115; Goldsborough vs. Cable, 140 id. 269) and the continued possession by the City, which had no election in the matter, fixes its character as such. (Taylor's Land. & Ten. (7th Ed.) sec. 22.)

There was considerable evidence bearing on the question whether the premises were fully vacated March 1, 1911, or a few days later. If there was no oral agreement and the holding over implied a tenancy from year to year or subject to extension for another year according to the provision in the lease therefor, it is immaterial whether the City vacated the premises March 1st or later. And if the City was liable for rent for the full year, whether it occupied the premises or not, we need not consider the fact that it made no appropriation for the last three months of it.

The case was submitted to the court for trial without a jury. Its finding of damages in the amount of \$51,607.31 included unpaid rental, according to the terms of the lease, to June 1, 1911. Such conclusion, therefore, involved finding that there was no oral agreement. In this we concur, not only because the preponderance of evidence is against it, but because there was no proof of authority by the agent to bind his principal to an agreement different from the written lease.

Whatever view the court took of the so-called notice contained in the letter of December 1st, 1909, it was

justified in disregarding it altogether in the absence of proof of authority to give a notice for the lessors. Even if it could be deemed an authorized notice to quit, it was, under the foregoing circumstances, waived, and the tenancy re-established upon its former footing. (Washburn on Real Prop. 3rd Ed. p. 524.) Whatever view, therefore, may be taken of the so-called notice it ceases to be an important element in the case. With the elimination from the case, therefore, of the main facts on which appellant relies, - an oral agreement and notice to vacate, there are no facts to distinguish this case from any other where the presumption of a tenancy from year to year arises from holding over on the payment and acceptance of monthly rent, according to the terms of a prior lease for a year or more, unless the doctrine is not applicable, as appellant claims, to a municipal corporation acting in its governmental capacity.

With these two facts eliminated appellant practically concedes that a tenancy from year to year would be created with a natural person under like conditions, but argues that inasmuch as the City did not use the premises during the three months in question and as an action to recover rent for that period must be based on an implied contract from holding over beyond the term of lease, the City cannot be held liable. The cases cited in support of this contention turn on some fact not present in the case at bar or hinge on the lack of authority to bind the municipality for the period that was in question. No question of authority arises here. Authority to bind the City in the execution of the lease at bar or for the period in question is admitted. And perhaps it might be said that the holding over was under the privilege granted by the lease, the landlord waiving the notice required by it. But we need not decide that

in effect in determining its jurisdiction in the absence of
proof of authority to give a notice for the purpose. When
it is said to be a notice for the purpose, it is
within the foregoing circumstances, and the remedy
is established upon its failure to do so. (Section on
Law, Art. 10, § 10.) However, that, therefore, may be
taken of the judicial notice it takes as to its jurisdiction
element in the case. With the elimination from the case,
therefore, of the main facts on which judicial notice is
an oral agreement and notice to verify, there are no facts
to establish this case then any other where the jurisdiction
of a territory from year to year is held in effect
the present and existence of judicial notice, according to the
terms of a prior law for a year or more, unless the jurisdiction
is not judicial, is judicial notice, is a judicial
jurisdiction acting in its governmental capacity.
With these facts judicial notice
judicial notice that a territory from year to year is
be created with a natural person under like conditions, but
against that knowledge as the City did not use the premises
during the time notice is given and so on for the
purpose that that notice must be based on an actual
actual fact holding the record for the City, the City
cannot be held liable. The case cited in support of this
jurisdiction term on some fact not present in the case at bar
or hinge on the lack of authority to bind the municipality
for the purpose that was in question. No question of authority
exists here. Authority to bind the City in the execution of
the purpose of the law is not in question in this case.
and perhaps it may be said that the holding was not under
the purpose of the law, the holding was not under
the notice required by it. But we need not notice that

question, for authority on the liability of the city from holding over is not wanting.

In the case of Davies vs. Mayor, etc. City of New York, reported in 83 N. Y. 207, and 93 N. Y. 250, on different appeals, the original lease of rooms for the city recorder for the period of one year from May 1, 1872, was executed with authority and there was a holding over until July 1, 1877, when the rooms were vacated for the occupancy of others that had been arranged for before but not occupied until after May 1, 1877. The suit was brought for the unpaid balance of rent up to May 1, 1878, and the city's liability therefor was in principle upheld. In its decision on the second appeal the court said:

"It was the duty of the City, if it desired to terminate the lease, to surrender possession. * * * The plaintiff had a right to assume, in the absence of notice, that his (the Recorder's) remaining in possession after May 1, 1877, was by authority or acquiescence of the defendant, and to treat it as a renewal of the lease for another year." (253)

The essential facts at bar are so similar to those in the case cited that we need not undertake to apply the principles announced in said decision further than to say that the lease here having been authorized and the city having held over without a new agreement, it was under such circumstances bound to a tenancy from year to year the same as a private individual would have been, and if it wished to escape the legal effect of a tacit agreement to such a tenancy, then it was bound to break its silence after the disavowal of the alleged oral agreement or surrender ^{of} possession before the termination of the lease.

We find no room for application to the facts of this case of either the doctrine of implied contracts or that of estoppel as presented on this appeal. We think the judg-

question, for authority on the liability of the city from holding over is not wanting.

In the case of Davis vs. Mayor, etc. City of

New York, reported in 83 N. Y. 107, and 93 N. Y. 320, on

affirmance, the original facts of the case were the

city received for the period of one year from May 1, 1877,

was executed with authority and there was a holding over

until July 1, 1877, when the terms were vacated for the

authority of others that had been arranged for before and

not occupied until after May 1, 1877. The suit was brought

for the annual balance of rent up to May 1, 1877, and the

city's liability therefor was in dispute. In its

decision on the record appeal the court said:

"It was the duty of the city, if it had been
to terminate the lease, to surrender possession.
* * * The plaintiff had a right to demand, in
the absence of notice, that the (the defendant's)
remaining in possession after May 1, 1877, was by
authority or acquiescence of the defendant, and to
treat it as a renewal of the lease for another
year." (103)

The essential facts of the case are similar to those

in the case cited that we need not undertake to apply the

principles announced in this decision further than to say

that the facts here have been authorized and the city

having held over without a new agreement, it was without

authority as shown to a tenant from year to year the same

as a private individual would have been, and it is within

to require the legal effect of a tacit agreement of such a

tenancy, then it was bound to break it up at the end of the

tenancy of the leased term, or otherwise.

Decision before the termination of the lease.

We find no room for objection to the facts of

this case of either the doctrine of implied contracts or that

of estoppel as presented on this appeal. We think the judge

-7-

rest should be affirmed.

AFFIRMED.

• 6. 1978. 10. 1. 1. 1. 1. 1.

[illegible]

203 I.A. 419

JAMES L. MARINO, for use of
Flavia Trucco, executrix under
the last will and testament of
Joseph Trucco, deceased,
Plaintiff in Error.

vs.

ANTONIO PARISI and NICOLA MONACO,
Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was a garnishment proceeding by Flavia Trucco, in her representative capacity, against Antonio Parisi and Nicola Monaco, garnishees, on a judgment for \$277.50 and costs, which she had obtained against one James L. Marino. Upon a hearing, the court dismissed the suit at plaintiff's costs and discharged the garnishees.

It appears from the evidence, that the said Marino had entered into a written agreement with the garnishee Monaco, by the terms of which the said Marino agreed to construct for the said garnishee, a certain building, at a cost of \$6,600; that \$300 had been paid to the said Marino at the time of its execution; that \$300 was to be paid on demand, and the remainder at the rate of 85% of the estimated value of the work performed, final payment to be made within 30 days after completion and acceptance of the entire work; that Marino waived, on behalf of himself and all subcontractors and others, the right to a mechanics' lien on said building or premises.

Garnishee, Parisi, made a loan of \$6,400 to the said Monaco, and was to pay out same as the building progressed, either to the said Monaco himself or as otherwise

203 I.A. 418

OF THE

CHICAGO

CHICAGO

JAMES D. HARRIS, for use of
Lloyd H. Harris, executor under
the last will and testament of
Joseph Harris, deceased,
plaintiff in error,

vs.

LEONARD HARRIS and KATHLEEN HARRIS,
defendants in error.

THE COURT HEREBY REVERSED THE DECISION OF THE COURT.

This was a writ of habeas corpus, granted by the court, in her representative capacity, against the said Harris and
Nicola Harris, garnishees, on a judgment for \$277.50 and
costs, which was set aside against the James D. Harris.
Then a hearing, the court dismissed the writ of habeas corpus
and set aside the judgment.

It appears from the evidence, that the said Harris
had entered into a written agreement with the garnishees
by the terms of which the said Harris agreed to
construct for the said garnishees, a certain building, at a
cost of \$5,000; that said cost was paid to the said Harris
at the time of its execution; that said cost was to be paid in
installments, and the remainder at the rate of \$500 of the estimated
value of the work performed. That payment to be made within
30 days after completion and acceptance of the entire work;
that Harris agreed, on behalf of himself and all subcontractors
and others, to provide a mechanic's lien on said building
and its proceeds.

Garnishees, Harris, made a loan of \$5,400 to the
said Harris, and was to pay out same as the building pro-

directed by him in writing.

Both garnishees filed answers in which they denied any indebtedness to the said Marino in any sum or sums whatsoever.

The evidence further shows, that after the garnishment proceedings had been commenced, and prior to the hearing thereon, sums aggregating upwards of \$1,500 were paid out by the garnishee Parisi to the said Marino, on orders signed by the garnishee Monaco.

The only question presented by the record now before us is, whether or not there was any money due the said Marino at the time the garnishment summons was served upon the garnishees, or to become due thereafter.

We are of the opinion that the garnishee Parisi was properly discharged. There is no evidence of any indebtedness either due or to become due, from the said Parisi to the said Marino. His contract to furnish money for the construction of the said building was with the garnishee Monaco, the owner thereof, and the said Marino, the general contractor, was not a party thereto.

But as to the garnishee Monaco, there is evidence that there was money either due or to become due, from him to the said Marino, with whom he had entered into the aforementioned contract. Upwards of \$1,500 was paid out on orders issued by the garnishee Monaco, after service of the said garnishee summons, which acted as an assignment of any funds then due or to become due the said Marino from garnishee Monaco. (Filcus et al. v. Kling, 37 Ill. 107.) Marino having expressly waived the right to a mechanics' lien on behalf of himself and all subcontractors and material men, such waiver was binding upon them. (Kelly v. Johnson, 251

Ill. 135.) The court therefore erred in discharging the garnishee Monaco.

The judgment, so far as the garnishee Monaco is concerned, will be reversed, and judgment entered in this court in favor of James L. Marino for use of Flavia Trucco, executrix, and against the garnishee Monaco, for \$309.98, this being the amount due plaintiff under the aforesaid judgment, plus costs and interest to date.

JUDGMENT REVERSED AND JUDGMENT IN THIS COURT.

496 - 21394

CHICAGO & RIVERDALE LUMBER
COMPANY, a corporation,
Appellee,

vs.

W. S. F. TATUM, doing business
as TATUM LUMBER COMPANY,
Appellant.

203 I.A. 421

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in favor of the appellee (plaintiff below) for the value of certain millwork and material.

On February 27, 1911 plaintiff submitted to the defendant at the latter's home at Hattiesburg, Mississippi, an offer in writing to furnish, for the sum of \$11,634.58, certain millwork and material described in a schedule thereto attached, to be used in the construction of a dwelling house to be erected at said place; also another offer to furnish, for the sum of \$365.42, certain lumber and building material described in a schedule thereto attached, to be used in the construction of a garage to be erected at the same place. Both offers were accepted by defendant on March 1, 1911 at the place aforesaid, and his acceptance noted thereon. Accordingly, the parties entered upon the performance of said agreement. After certain shipments had been made by the plaintiff, the defendant complained that the measurements of some of the material shipped did not conform to certain plans and specifications which he alleged formed a part of the contract hereinabove set forth. This gave rise to a controversy

100-31334

CHICAGO & NORTHERN
INDUSTRIAL COMPANY, a corporation,
Appellee,

vs.
MUNICIPAL COURT
OF CHICAGO.

E. S. F. TAYLOR, being defendant
as TAYLOR, LINDSEY & COMPANY,
Appellant.

MR. JUSTICE BRONSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in
favor of the appellee (plaintiff below) for the value of
certain millwork and material.

On February 27, 1911 plaintiff submitted to the
defendant as the latter's agent at Indianapolis, Indiana,
an offer in writing to furnish, for the sum of \$11,434.52,
certain millwork and material described in a schedule hereto
attached, to be used in the construction of a dwelling house
to be erected at said place; also another offer to furnish,
for the sum of \$11,434.52, certain lumber and building material
described in a schedule hereto attached, to be used in the
construction of a garage to be erected at the same place.
Both offers were accepted by defendant on March 1, 1911 and the
work was done, and the acceptance noted thereon. Accordingly,
the parties entered upon the performance of said contracts.
After certain contracts had been made by the plaintiff, the
defendant complained that the millwork of some of the
material shipped did not conform to certain plans and
specifications which he alleged formed a part of the con-
tract heretofore set forth. This gave rise to a controversy

between the parties, resulting in the discontinuance of further shipments, which finally culminated in the making of the following contract, dated July 3, 1911, at Hattiesburg, Mississippi:

"WHEREAS: On March first, 1911 Tatum Lumber Company, of Bonhomie, Forrest County, Mississippi, party of the first part, placed an order for certain millwork and material with the Chicago and Riverdale Lumber Co., of Riverdale, Chicago, Illinois, party of the second part, said millwork and material for residence of W. S. F. Tatum, as per plans, specifications and full sized details drawn by George F. Barber & Company, of Knoxville, Tennessee; and

"WHEREAS: A controversy has arisen in regard to the portion of the work that has been furnished on this order, and in order to make an amicable settlement of said controversy, it is therefore agreed as follows:

"First: The party of the first part agrees to use such of the material that is in Hattiesburg as conforms to the plans, specifications, and full size details.

"Second: That party of the second part agrees to replace and make good without expense to the party of the first part any and all portions of the material that is in Hattiesburg that does not conform to the plans, specifications, and full size details; and also agrees to replace and make good without expense to the party of the first part any material that is damaged in shipping.

"Third: It is agreed that the party of the first part shall purchase all mantels, art glass, and screen work from first class manufacturers of these various items; the price to be in line with prices named in specifications for mantels and art glass, and (12¢) twelve cents per square

between the parties, resulting in the discontinuance of further litigation, which finally culminated in the making of the following contract, dated July 21, 1931, at Washington, D.C.:

"REMARKS: On March 11th, 1911, I was informed by George W. Barber & Company, Knoxville, Tennessee, and
specialists and Bill Owen Smith Street at Georgia W.
referred for residence of W. B. Tamm, as per plans,
Illinois, part of the second part, said millwork and
the Chicago and Milwaukee Transfer Co., of Chicago, Illinois,
part, placed an order for certain millwork and material with
of Washington, Forest City, Wisconsin, party of the first

of the material that is in conformity with the
first: The body of the text must agree to the
very, it is therefore revised as follows:

Second: That part of the second was known to the
place was made known without express to the party of the first
part of all parties of the material that is in
that party that was not known to the party, especially
and will also be known; and the party of the first part was
known without express to the party of the first part was
known without express to the party of the first part was

"Third: It is agreed that the work of the first

foot for screens and same to be deducted from contract price.

"Fourth: The party of the second part agrees not to manufacture or ship any further material on this order except such as conforms in every respect with the requirements of the plans, specifications and full size details, which are to be furnished by the party of the first part and agrees that the workmanship on all material shall be first class in every respect.

"Fifth: Whereas the material shipped has been primed without a full understanding between the parties; it is agreed that the party of the second part will make no charge for this painting.

"Sixth: It is agreed by the party of the second part that in case it shall fail to replace or furnish any material needed to make any part of the shipment now in Hattiesburg conform to the requirements of the plans, specifications, and full size details, after fifteen days' notice from the party of the first part, then and in that case the party of the first part is authorized to replace or furnish same and charge the cost of said material to the party of the second part.

"Seventh: It is agreed by the party of the second part in the event it fails or refuses to furnish in accordance with the requirements of plans, specifications and full size details, any portion of the work still due on this order, within (60) sixty days after building is ready for measurements to be taken and the party of the second part is notified by mail, that after giving (30) thirty days written notice, the party of the first part shall be authorized to supply same and charge the cost of such material to the party of the second part.

"Eighth: The party of the second part hereby agrees

that for reasons not known to be disclosed from contract prices.

"Fourth: The party of the second part agrees not to

manufacture or ship any further material on this order

except such as conforms in every respect with the require-

ments of the plans, specifications and full size details,

which are to be furnished by the party of the first part

and agrees that the responsibility on all material shall be

first class in every respect.

"Fifth: Where the material shipped has been finished

without a full understanding between the parties; it is

agreed that the party of the second part will make no charge

for this painting.

"Sixth: It is agreed by the party of the second part

that in case it shall fail to replace or furnish any material

needed to make any part of the shipment now in Baltimore

conform to the requirements of the plans, specifications, and

full size details, after fifteen days' notice from the party

of the first part, then and in that case the party of the

first part is authorized to replace or furnish same and charge

the cost of said material to the party of the second part.

"Seventh: It is agreed by the party of the second part

in the event it fails or refuses to furnish in accordance

with the requirements of plans, specifications and full size

details, any portion of the work still due on this order,

within (60) sixty days after failing to comply for same

to be taken and the party of the second part is authorized

well, that after giving (30) thirty days' written notice, the

party of the first part shall be authorized to supply same

and charge the cost of such material to the party of the

second part.

"Eighth: The party of the second part hereby agrees

to furnish bond in good Surety Company to the amount of Five Thousand Dollars (\$5000.00), as a guarantee that it will perform faithfully its part of this contract, said bond to be payable to the party of the first part."

Subsequently shipments were resumed by plaintiff. Defendant, however, continued to complain that some of the material received by him did not conform to the measurements called for by the plans and specifications referred to in contract of July 3rd.

Defendant also was a dealer in lumber. Between October, 1910, and August, 1912, he made shipments of lumber to the plaintiff, aggregating in value some \$8,000, for which the latter gave him credit. He also received credit for certain miscellaneous items, such as defective millwork furnished by plaintiff and returned by the defendant, etc. Plaintiff's claim is set forth in the pleadings as follows:

"To amount as per contract order - - - - -	\$12,000.00
To extras - - - - -	1,157.12
To freight - - - - -	18.34
To interest - - - - -	790.11
	<u>\$13,965.57</u>
By credits - - - - -	\$1136.00
By lumber delivered - - - - -	8359.53
Total credits - - - - -	<u>9,495.53</u>
Balance due - - - - -	\$4,470.04"

The jury returned a verdict in favor of the plaintiff, for the sum of \$3581.35 upon which judgment was entered.

The paramount question here presented is, the construction to be placed upon the contracts hereinabove mentioned, i. e. the contract of March 1st and that of July 3rd, 1911.

On the trial below, defendant sought to introduce evidence tending to show that the contract of March first was partly oral and partly in writing, and that the plans and specifications in question formed a part thereof. The apparent object of this offer was to show that the plaintiff

to furnish bond in good surety Company to the amount of five thousand dollars (\$5,000.00), as a guarantee that it will perform faithfully its part of this contract, said bond to be payable to the party of the first part."

Subsequently shipments were received by plaintiff. Defendant, however, continued to complain that some of the material received by him did not conform to the measurements called for by the plans and specifications referred to in contract of July 2nd.

Defendant also was a dealer in lumber. Between October, 1911, and August, 1912, he made shipments of lumber to the plaintiff, aggregating in value some \$8,000, for which the latter gave him credit. He also received credit for certain miscellaneous items, such as defective millwork furnished by plaintiff and returned by the defendant, etc. Plaintiff's claim is set forth in the pleadings as follows:

To amount as per contract order	\$12,500.00
To extras	1,157.12
To freight	18.34
To interest	702.17
Total	\$14,357.63

By credits	\$1,150.00
By lumber delivered	2,282.83
Total credits	\$3,432.83
Balance due	\$10,924.80

The jury returned a verdict in favor of the plaintiff, for the sum of \$10,924.80 upon which judgment was entered. The present question here presented is, the construction to be placed upon the contract heretofore mentioned, i. e. the contract of March 1st and that of July 2nd, 1911. On the trial below, defendant sought to introduce evidence tending to show that the contract of March 1st was partly oral and partly in writing, and that the plans and specifications in question formed a part thereof. The agreed object of this offer was to show that the plaintiff

had in fact agreed to furnish all the material called for by the plans and specifications, a number of which items were not included in the aforesaid estimates. The court, however, excluded such offered evidence, and defendant now contends that the court erred in so doing.

We are of the opinion that this evidence was properly excluded. While it appears from the evidence, that in the preparation of these estimates and detailed schedules thereto attached, plaintiff had before it the plans and specifications in question, yet the estimates do not in any way refer to them, but, on the contrary, purport to be complete in themselves. Furthermore, they were submitted in their entirety to the defendant for his inspection and approval, and accepted by him with a minor change thereon noted. This constituted a complete contract in writing to furnish a definite quantity of material for a price therein mentioned, and under the well-settled parol evidence rule, the terms thereof cannot be enlarged by oral evidence.

It is next contended by defendant, that the court erred in striking certain items from defendant's claim of set-off. In so doing, the court held, inter alia, that the defendant could not recover from the plaintiff any expense incurred by him for labor or superintendence in reconstructing or reforming material delivered by plaintiff which did not conform to the plans and specifications, and that by the contract of July 3, 1911, defendant was limited in his right of recovery for any damages that might result from any future breach of that contract, to the provision contained in clause 7 thereof, but that it was a complete accord and satisfaction for all damages accruing prior thereto.

In our opinion, the contract of July 3 is supple-

Had in fact agreed to furnish all the material called for by the plans and specifications, a number of which items were not included in the defendant's estimate. The court, however, excluded such offered evidence, and defendant now contends that the court erred in so doing.

We are of the opinion that this evidence was properly excluded. While it appears from the evidence that in the preparation of these estimates and detailed schedules thereto attached, plaintiff had before it the plans and specifications in question, yet the estimates do not in any way refer to them, but, on the contrary, purport to be complete in themselves. Furthermore, they were submitted in plain English to the defendant for his inspection and approval, and accepted by him with a signed change thereon noted. This constituted a complete contract in writing to furnish a definite quantity of material for a price therein mentioned, and under the well-settled legal evidence rule, the terms thereof cannot be enlarged by oral evidence.

It is next contended by defendant, that the court erred in striking certain items from defendant's claim of set-off. In so doing, the court held, inter alia, that the defendant could not recover from the plaintiff any amount incurred by him for labor or superintendence in reconstructing or reforming material delivered by plaintiff which did not conform to the plans and specifications, and was by the contract of July 5, 1911, defendant was limited in his right of recovery for any damages that might result from any future breach of that contract, to the provision contained in clause 7 thereof, but that it was a complete accord and satisfaction for all damages occurring prior thereto. In our opinion, the contract of July 5 is applicable

mental to that of March 1st, and both should be construed together. The obvious purpose of the supplemental contract was to require plaintiff to furnish the material called for in the original contract, in accordance with measurements contained in the plans and specifications, and to afford defendant the additional right to purchase such material in the open market and charge the cost thereof to plaintiff upon the latter's failure to furnish same, upon notice, within the time provided in clause 7 thereof. It will be noted that the supplemental contract of July 3rd contains no details respecting the material furnished and to be furnished, such as quantity, price, etc. Without such information said contract is incomplete, hence in order to arrive at the intent of the parties, we must read the two together.

We think the trial court properly held that clause 6 of the supplemental contract expressly fixed the rights and limited the liability of the plaintiff, with respect to the damages for material already delivered, and that it was a complete accord and satisfaction of the damages that had accrued prior thereto.

Clause 7 required plaintiff to manufacture material to be delivered in the future, according to the plans and specifications, and provided that in the event of the failure of the plaintiff to do so, upon the giving of the requisite notice, defendant was authorized to purchase said material in the open market and charge the cost thereof to the plaintiff. As we view this clause, the remedy therein provided is optional, and does not deprive the defendant of his common law right to recover damages for a breach of the contract, nor does this clause by its terms purport to limit the liability of the plaintiff for a breach thereof.

A case very much in point is Kemp et al. v.

mental to that of which last, and both would be connected together. The obvious purpose of the supplemental contract was to require plaintiff to furnish the material called for in the original contract, in accordance with the requirements contained in the plans and specifications, and to afford defendant the additional right to purchase such material in the open market and charge the cost thereof to plaintiff. Now the latter's failure to furnish same, upon notice, within the time provided in clause 7 thereof. It will be noted that the supplemental contract of July 2nd contains no clause respecting the material furnished and to be furnished, such as quantity, price, etc. At least such information said contract is incomplete, hence in order to arrive at the intent of the parties, we must read the two together.

To think the trial court properly held that clause 8 of the supplemental contract expressly fixes the rights and limits the liability of the plaintiff, with respect to the damages for material already delivered, and that it was a complete accord and satisfaction of the damages that had occurred prior thereto.

Clause 7 required plaintiff to manufacture and deliver to be delivered in the future, according to the plans and specifications, and provided that in the event of the refusal of the plaintiff to do so, upon the giving of the requisite notice, defendant was authorized to purchase said material in the open market and charge the cost thereof to him. It is also true that clause 8, the newly inserted, provided is optional, and does not deprive the defendant of his common law right to recover damages for breach of the contract, nor does this clause by its terms operate to limit the liability of the plaintiff for a breach thereof.

Freeman, 42 Ill. App. 500. This was an action for an alleged breach of warranty of a stallion. Kamp recovered a judgment of \$500 against Freeman, although there was an express warranty whereby the vendor agreed to replace the stallion should he prove a poor breeder. In affirming the judgment, this court stated, p. 501:

"The warranty was a written one, and so far as it concerns the issue here, is as follows:

'We warrant the animal to be sound and healthy and in every respect an average breeder, and in case he fails to be an average breeder we agree to take him back and replace him with another horse of equal value and merit.'

"The breach alleged is that the horse failed to be an average breeder.

"Appellants contend that this contract of warranty compelled the appellee in a case of a breach in this respect claimed, to return the horse, and accept in its stead another that possessed the quality required by the warranty.

"A contract no doubt might have been so framed as to deprive the appellee of his legal right to an action for damages in case of a breach, and to require him in lieu thereof to return the horse and accept another that would satisfy the warranty. The contract under consideration does not, however, even purport so to do, but on the contrary, by it the sellers warrant the horse to be an average breeder, and in addition to such warranty upon which the buyer may recover damages if there be a breach, the sellers agree that they will accept a return of the horse and replace him with another of merit and value equal to the warranty. Clearly the buyer has the option of an action on the breach for damages, or to return the horse and receive another in his stead.

"He selected an action at law for damages and no reason is known why he can not maintain it."

The foregoing decision is cited with approval in Cook v.

Lantz, 116 Ill. App. 472.

In Jackson et al. v. Cleveland, 19 Wis. 442, the court was confronted with a situation very much akin to that presented in the case at bar, and it was held that the right to recover general damages was not waived by a failure to exercise the option contained in the contract to assume completion of the work under construction. The following language on pages 430 and 431 is quite illuminating:

Thompson, 42 Ill. App. 505. This was an action for an
affirmed breach of warranty of a stallion. The plaintiff
a judgment of \$200 against defendant, although there was an
affirmed warranty that the vendor would replace the
stallion should he prove a poor breeder. In affirming the
judgment, this court stated, p. 501:

"The warranty was a written one, and so far as
it concerns the issue here, is as follows:
'I warrant the animal to be sound and healthy
and in every respect an average breeder, and in
case he fails to be an average breeder we agree to
take him back and replace him with another horse
of equal value and quality.'
The breach alleged is that the horse failed to
be an average breeder.
The plaintiff contends that this contract of war-
ranty compelled the seller in a case of a breach in
this respect claimed, to return the horse, and replace
in its stead another that possessed the quality re-
quired by the warranty.
A contract no doubt might have been so framed
as to deprive the seller of his legal right to an
action for damages in case of a breach, and to require
him in lieu thereof to return the horse and replace
another that would satisfy the warranty. This contract
under consideration does not, however, even purport
to do so, but on the contrary, by its terms purports
the horse to be an average breeder, and in addition to
such warranty upon which the buyer may recover damages
if, however, a breach, the seller agrees that they will
accept a return of the horse and replace him with another
of equal value and quality to the warranty. Clearly the
buyer has the option of an action on the breach for
damages, or to return the horse and receive another in
his stead.
We select an action at law for damages and no
reason is given why he can not maintain it."

The foregoing decision is cited with approval in Case v.
Case, 112 Ill. App. 471.

In Johnson v. Johnson, 112 Ill. App. 127, the

court was confronted with a situation very much akin to
that presented in the case at bar, and it was held that the
right to recover for a breach was not waived by a failure
to exercise the option contained in the contract to secure
completion of the work and reconstruction. The following
language on pages 129 and 131 is of interest:

"It appears from the record that the defendant below called witnesses to prove his counterclaim set up in the answer and offered to show the damages which he had sustained in consequence of the breach of the contract on the part of the plaintiffs. This testimony was objected to and excluded on the ground, as stated in the bill of exceptions, that by the contract between the parties, the only consequence of a breach thereof on the part of the plaintiffs was to give the right to the defendant either to declare the contract at an end, or to employ men for the completion of the work at the plaintiffs' expense; and that no damages for a breach of the contract by them were recoverable as an offset to their claim. * * *

"According to our view there is nothing whatever in the contract which, upon any fair construction, can be said to deprive the defendant of the right to claim and recover any damages which he may have sustained by a breach of its provisions on the part of the plaintiffs. The reservation of the power to end the contract, if the work was not progressing with sufficient rapidity, or to put men on to complete it at the expense of the plaintiffs, cannot have the effect of destroying this right."

To the same effect are: Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Co., 181 Fed. 33; Webster County v. Nelson et al., 135 N. W. 390; Nowlin v. Pyne, 40 Iowa, 166; Garfield & Proctor Coal Co. v. Penna Coal Co., 84 N. W. 1020; Thomas China Co. v. Raymond Co., 135 Fed. 25. It follows from this that the trial court erred in its construction of clause 7 of the supplemental agreement.

It is also contended that the court erred in admitting evidence of an alleged custom which permitted the plaintiff to furnish millwork of scant dimensions measuring a fraction of an inch less than that called for by the plans and specifications. From an examination of the evidence adduced on this point, we are of the opinion that plaintiff has failed to prove a custom so general in its application or recognition as to make it admissible, nor is there any evidence tending to show that defendant had knowledge of such a custom or could be presumed to have contracted with reference to it, if such custom existed.

It is further contended that the court erroneously instructed the jury that plaintiff might recover interest

at the rate of five per cent per annum, on the balance found to be due, provided they believed from the evidence that defendant was guilty of unreasonably and vexatiously withholding payment thereof.

The contracts in question, both of which were executed in the State of Mississippi, make no provision for interest, and are silent with respect to the place of payment, in which latter event it must be presumed that the money was payable where they were executed (9 Cyc. 669 and cases cited); and the existence or nonexistence of the right to recover interest must also be determined from the lex loci contractus (Potter v. Taliman, 35 Barb. 182). The statutes of Mississippi relating to interest were not introduced in evidence, nor were they pleaded. Obviously, therefore, it was error to so instruct the jury. Nor was this error cured by the fact that defendant, in his plea of setoff, claimed interest by virtue of a certain section of the Mississippi code. Defendant did not set forth the provisions of said section. The court, therefore, had no way of determining whether or not interest was allowable under the said code, for unreasonable and vexatious delay.

Defendant makes the further point that the jury were erroneously instructed with reference to plaintiff's right of recovery for extras furnished to the defendant. The jury were told that plaintiff was entitled to recover the fair market value of all such extras, at the time and place such material was furnished. The vice pointed out by defendant is, that the instruction failed to differentiate between extras which were of the same general character as those specified in the contract, and those which were not. We are of the opinion that the jury were inaccurately instructed in this regard. Under the circumstances, the

at the rate of five per cent per annum, on the balance found to be due, provided they believed from the evidence that defendant was guilty of unconscionable and vexatiously withholding payment thereof.

The contracts in question, both of which were executed in the State of Mississippi, make no provision for interest, and are silent with respect to the place of payment, in either party's event it must be presumed that the money was payable where they were executed (S. Cyc. 409 and cases cited); and the existence or nonexistence of the right to recover interest must also be determined from the law local to Mississippi (S. Cyc. 409, 410, 411). The defendant of Mississippi relating to interest were not introduced in evidence, nor were they pleaded. Obviously, therefore, it was error to so instruct the jury. Nor was this error cured by the fact that defendant, in his plea of abatement, claimed interest by virtue of a certain section of the Mississippi code. Defendant did not set forth the provisions of said section. The court, however, had no way of determining whether or not interest was allowable under the said code, for unconscionable and vexatious delay. Defendant makes the further point that the jury were erroneously instructed with reference to plaintiff's right of recovery to return rendered to the defendant. The jury were told that plaintiff was entitled to recover the fair market value of all such notes, at the time and place each material was furnished. The view pointed out by defendant is, that the instruction failed to differentiate between notes which were of the same general character as those specified in the contract, and those which were not. We are of the opinion that the jury were instructed as instructed in this regard. Under the circumstances, the

extras furnished by plaintiff which were of the same general character as those called for in the contract, should be charged ^{for} ~~at~~ the contract price.

Other errors have been assigned by the appellant, but as the judgment must be reversed and the cause remanded for the reasons hereinabove assigned, we refrain from discussing them, in the belief that if errors were committed, on another trial they will not recur.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

... by ... of the ...
 ... in the ...
 ... for the contract price.

... by the ...
 ... and the ...
 ... for the ...
 ... in the ...
 ... will not ...

The ... will be ... and the ...

...

...

WOOD STREET PLANING MILL
COMPANY,

Appellant,

vs.

INDUSTRIAL BOARD OF ILLINOIS,
et al.,

Appellees.

203 I.A. 431

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Charles Brichacek, an employee of appellant, was struck in the abdomen by a piece of wood hurled from a rip-saw which he was operating in appellant's plant. The injury occurred on July 23, 1913, from which death ensued on the following day, and this action was brought under the Workmen's Compensation act.

In the proceedings before the Industrial Board it was alleged by way of defense, that the accident did not arise out of and in the course of the employment. The committee of arbitration decided that the petitioner was not entitled to compensation, whereupon a petition for review was filed, and upon a hearing before the Industrial Board the petitioner was awarded \$3,500 as compensation for the death of the said Brichacek. The matter was then presented to the Circuit court by way of a writ of certiorari, where, upon consideration of the record, the court entered an order quashing the writ. This appeal brings before us for review the action of the court in so disposing of the writ.

The sole contention advanced by appellant is, that there is no credible evidence in the record to sustain the finding of the Industrial Board, and hence it exceeded

2031.A.431

A JUDGE OF THE CIRCUIT COURT
OF COOK COUNTY.

FOR THE PETITIONER
APPLICANT
vs.
INDUSTRIAL BOARD OF ILLINOIS
as respondent.

THE JUDGE OF THE CIRCUIT COURT OF COOK COUNTY.

On this day, the petitioner, an employee of respondent, was struck in the abdomen by a piece of wood which fell from a platform which he was operating in respondent's plant. The injury occurred on July 22, 1913, from which death ensued on the following day, and this action was brought under the Workmen's Compensation Act.

In the proceedings before the Industrial Board it was alleged by way of defense, that the accident did not arise out of and in the course of the employment. The committee of arbitration decided that the petitioner was not entitled to compensation, whereupon a petition for review was filed, and upon a hearing before the Industrial Board the petitioner was awarded \$3,500 as compensation for the death of the said deceased. The matter was then presented to the Circuit Court by way of a writ of certiorari, where, upon consideration of the record, the court entered an order quashing the writ. This appeal brings before us for review the action of the court in its disposing of the writ. The sole contention advanced by respondent is that there is no credible evidence in the record to sustain the finding of the Industrial Board, and hence it exceeded

its powers in making the award in question.

The evidence shows that at the time of the accident the deceased was in the employ of the appellant, and that the injury occurred on the premises where he was employed, while operating a rip-saw; that at the time in question the regular foreman under whose immediate supervision the deceased had worked, was away on his vacation, and that meanwhile one Charley Fenslow, a teamster, acted as foreman in his stead; that on previous occasions, while in the course of his employment, the deceased had operated various wood-cutting machines in appellant's plant, among them being the rip-saw which caused his death; that on the day of the accident, and for some time prior thereto, one Simon Bykowsky had served as helper to the deceased.

It is maintained by appellant that the deceased went to the rip-saw to cut a maple board, for some purpose of his own, at the time he was injured. It is undisputed that on the day of the accident the deceased had completed his work on the matching machine, and that Fenslow assigned him to some other work. There is a conflict in the evidence as to what Fenslow then ordered the deceased to do. Fenslow testified that he ordered the deceased to work on the re-saw machine, but the deceased, disregarding such order, went to the rip-saw for the purpose of sawing a board for his own use, and was injured. Bykowsky testified, however, that the deceased was ordered to work on the rip-saw in question, and that he was obeying such order when injured. On cross examination Bykowsky admitted that he understood but very little of the English language, - only a few words relating to his work - and from an examination of his testimony it is clear that his knowledge of the English language was very

the papers in making the search in question.

The evidence shows that at the time of the de-

ceased the deceased was in the employ of the applicant, and that the injury occurred on the premises where he was em-

ployed, while operating a typewriter; that at the time in ques-

tion was regular for him under these immediate supervision

the deceased had worked, and away on his vacation, and that

as a result of the injury, a letter, dated as follows

in his hand; that on previous occasions, while in the employ

of his employment, the deceased had operated various mach-

in his employ, among them being

the typewriter which caused his death; that on the day of the

accident, and for some time prior thereto, was given typew-

sky and served as helper to the deceased.

It is maintained by applicant that the deceased

went to the typewriter to cut a single sheet, for some purpose

of his own, at the time he was injured. It is contended

that on the day of the accident the deceased had completed

his work on the machine in question, and that he was assigned

him to some other work. There is a conflict in the evidence

as to what he was then ordered the deceased to do. Testimony

testified that he ordered the deceased to work on the typewriter

machine, but the deceased, disregarding such order, went to

the typewriter for the purpose of cutting a sheet for his own use,

and was injured. It is contended, however, that the de-

ceased was ordered to work on the typewriter in question, and

that he was operating such machine when injured. On cross

examination applicant testified that he understood that very

little of the English language, - only a few words relating

to his work - and that on examination of the testimony it

is clear that his knowledge of the English language was very

meagre. In relating what occurred at the time the order was alleged to have been given, Bykowsky testified:

"He" (meaning the foreman) "showed him what board he should take and how he should cut it. * * * When the boss came up the machinist that was killed was pushing those planks, got a hold of him by the shoulder. * * * That was the man that I was helping. The boss took hold of his arm and asked him and showed him. He was going here and there to the machine. Just after the foreman took hold of the machinist by the arm, he told him to go back to the wall to the machine. He said, 'No. 2.' * * * The foreman pointed at the plank more than once. * * * There were about eight or nine boards that the foreman pointed to. * * * When I saw the foreman pointing to the boards I saw that he indicated with his finger which board he should take and drew his finger across the board and told him how to cut it. He just ran his hand over the board that way." (indicating.)

What the witness indicated, in describing the manner in which the foreman drew his finger across the board, does not appear in the record, hence it is meaningless to this court. However, the Industrial Board did see this gesture, and for aught that the record discloses, may have attached some significance to it in arriving at its conclusion.

From a careful examination of the entire record we are constrained to hold that there is some evidence contained therein from which it may be reasonably inferred that the deceased, at the time of the injury, was engaged in the course of his employment. In arriving at this conclusion we are not unmindful of the fact that there was a great amount of countervailing evidence submitted on behalf of the appellant, who presented the greater number of witnesses, the testimony of whom is, in many respects, far more plausible than that of Bykowsky, whose testimony was rendered more or less unreliable by reason of his admissions and conflicting statements. These latter, however, are merely elements of credibility, and even though from an examination of the record it is apparent that the Industrial Board in arriving at its conclusion attached undue weight to testimony tainted with

... is relating what occurred at the time the order was

afforded to have been given, as previously testified:

"The" (naming the Foreman) "showed me that board he should take and how he should cut it. * * * Then the boss came to the machine that was killed was killed. * * * Those things, got a hold of him by the shoulder. * * * That was the man that I was talking. The boss took hold of his arm and asked him and showed him. He was going here and there to the machine. Just after the Foreman took hold of the machine by the arm, he told him to go back to the wall in the machine. He said, 'No, I'. * * * The Foreman pointed at the plank more than once. * * * There were about eight machine boards that the Foreman pointed to. * * * When I saw the Foreman pointing to the boards I saw that he indicated with his finger which board he should take and threw his finger across the board and told me how to cut it. He told me the board over the board they say." (Indicating.)

That the witness indicated, in describing the manner in which the Foreman drew his finger across the board, does not appear in the record, since it is meaningless to this Court. However, the Industrial Board did see this gesture, and for that fact the record discloses, may have attached more significance to it in arriving at its conclusion.

From a careful examination of the entire record we are convinced to hold that there is some evidence contained therein from which it may be reasonably inferred that the deceased, at the time of the injury, was engaged in the course of his employment. In arriving at this conclusion we are not unmindful of the fact that there was a great amount of contradictory evidence submitted on behalf of the respondent, and presented the greater number of witnesses, the testimony of whom is, in many respects, far more plausible than that of Dymovsky, whose testimony was rejected more or less unhesitatingly by reason of his statements and conflicting statements. These latter, however, are merely elements of credibility, and even when taken as examinations of the record it is apparent that the Industrial Board in arriving at its conclusion attached undue weight to testimony tainted with

circumstances of suspicion, yet in view of the fact that the legislature has conferred upon said board the sole right to pass upon questions of fact and the credibility of witnesses, we are powerless to disturb its finding.

We are therefore of the opinion that the Circuit court did not err in quashing the writ of certiorari and in dismissing appellant's petition, and its judgment is therefore affirmed.

AFFIRMED.

circumstances of the case, yet in view of the fact that the
legislature has conferred upon said board the sole right to
pass upon questions of fact and the credibility of witnesses,
we are powerless to disturb its finding.

We are therefore of the opinion that the circuit
court did not err in granting the writ of certiorari and in
reversing the appellate court's decision, and its judgment is there-
fore affirmed.

REVEREND.

203 I.A. 433

THE PEOPLE OF THE STATE OF
ILLINOIS ex rel. James J.
Brady, as Auditor of Public
Accounts,

Appellee,

vs.

LA SALLE STREET TRUST &
SAVINGS BANK et al.

In re Intervening Petition
of WEXFORD COMPANY, a cor-
poration,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This appeal brings before us for review an order dismissing for want of equity an intervening petition filed by appellant, hereinafter designated as the petitioner, in a suit brought by the relator to dissolve the La Salle Street Trust & Savings Bank, hereinafter referred to as the bank, and for the appointment of a receiver therefor. To this petition the receiver, who was made respondent, filed an answer.

From the decree of dissolution which is contained in the transcript of record, it appears that the court found the bank ceased doing business on June 11, 1914; that the bank on said date was, and ever since has been, insolvent, and that its assets were insufficient to discharge its entire liabilities to its creditors; and directed that the assets be converted into money and the proceeds thereof, after payment of the costs of suit and expenses of the receivership, be distributed among the creditors of the bank according to their respective rights as the same should be

3031.A.433

THE PEOPLE OF THE STATE OF
ILLINOIS, ss. James L.
Tracy, ss. Auditor of Public
Accounts,

Appellee,

vs.

LA SALLE STREET TRUST &
SAVING BANK, et al.,

In re Intervening Petition
of WESTBROOK COMPANY, a cor-
poration,

Appellant.

STATE OF ILLINOIS
CIRCUIT COURT,
COOK COUNTY.

BEFORE ME, JAMES L. TRACY, JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

This special brings before me for review an order
dissolving for want of equity an intervening petition filed
by appellant, intervenor designated as the petitioner, in
a suit brought by the trustee to dissolve the La Salle
Street Trust & Savings Bank, intervenor referred to as the
bank, and for the appointment of a receiver therefor. To
this petition the receiver, who was made respondent, filed
an answer.

From the course of discussion which is contained
in the transcript of record, it appears that the court found
the bank ceased doing business on June 11, 1911; that the
bank on said date was, and ever since has been, insolvent,
and that the assets were insufficient to discharge its debts
liabilities to its creditors; and directed that the assets
be converted into money and the proceeds thereof, after
payment of the debts of said and expenses of the receiver-
ship, be distributed among the creditors of the bank
according to their respective claims as the same might be

made to appear.

The intervening petition alleged and the respondent's answer admitted, inter alia, the following facts: that at the date of the closing of the bank, petitioner owed it \$5,000 on its promissory note; that since the closing of the bank the money on deposit to the credit of the petitioner aggregating \$3,850.75, had been applied on said note of \$5,000, leaving a balance due from petitioner thereon of \$1,149.25, with accrued interest; that the Boulevard Cafe Company, a corporation, also had on deposit in the bank at the date of its closing, the sum of \$6,217.29, which it had assigned to the receiver of the bank as collateral security for the balance due it from the petitioner on said promissory note for \$5,000, and that at the time of filing the intervening petition the said receiver held said account of the Boulevard Cafe Company as such.

The petition further alleged that the Boulevard Cafe Company, on the date of the closing of the bank, owed the petitioner a sum in excess of \$6,217.29, and that it assigned said deposit account in the bank to the petitioner, which assignment was of record on the books of the bank, subject to the prior assignment to the receiver as collateral security for the balance of petitioner's note of \$5,000; that the said Boulevard Cafe Company was almost entirely owned by the petitioner; that it occupied the building owned by the petitioner and had the same officers and was operated in conjunction with the petitioner; all of which was neither admitted nor denied in respondent's answer, but strict proof thereof demanded.

The petition prayed that an order be entered

made to appear.

The intervening petition alleged and the respondent's answer admitted, inter alia, the following facts: That at the date of the closing of the bank, petitioner owed it \$5,000 on its promissory note; that since the closing of the bank the money on deposit to the credit of the petitioner aggregating \$3,800.75, has been applied on said note of \$5,000, leaving a balance due from petitioner thereon of \$1,199.25, with accrued interest; that the Hollenback Cattle Company, a corporation, also had on deposit in the bank at the date of its closing the sum of \$6,317.25, which it had assigned to the receiver of the bank as collateral security for the balance due it from the petitioner on said promissory note for \$5,000, and that at the time of filing the intervening petition the said receiver held said account of the Hollenback Cattle Company as such.

The petition further alleged that the Hollenback Cattle Company, on the date of the closing of the bank, owed the petitioner a sum in excess of \$6,317.25, and that it assigned said deposit account in the bank to the petitioner, which assignment was of record on the books of the bank, subject to the prior assignment to the receiver as collateral security for the balance of petitioner's note of \$5,000; that the said Hollenback Cattle Company was almost entirely owned by the petitioner; that it occupied the building owned by the petitioner and had the same others and was operated in conjunction with the petitioner; all of which were matters admitted and denied in respondent's answer, but which were not controverted.

The petition prayed that an order be entered

authorizing and directing the receiver to credit the Boulevard Cafe Company deposit account pro tanto as an off-set upon the balance due on said \$5,000 note; to cancel the former assignment and carry the balance thereof to the credit of the petitioner on the books of the bank, subject to the result of the receivership and the further order of the court.

On the hearing the petitioner offered no evidence, but counsel stated he had a witness, then said to be absent from the city, by whom he desired to prove certain facts alleged in the petition and not admitted by the answer. The court thereupon dismissed the petition, and in doing so, stated that in view of the pleadings it did not regard the proposed testimony as material.

It is now contended by the petitioner, that the court erred in not taking into consideration the facts which counsel stated he desired to prove by the absent witness.

Proof of the material allegations of the petition not admitted by the answer was indispensable. The petitioner having failed to make such necessary proof, and no application for continuance having been made for the purpose of producing the witness in question, there is nothing in the record from which we can say that the court erred in dismissing the petition. The order of dismissal will therefore be affirmed.

AFFIRMED.

authorizing and directing the receiver to credit the
University with the deposit account for \$10,000 and an
affidavit was filed on March 15, 1900, showing that
cancel the former assignment and carry the balance thereof
to the credit of the petitioner on the books of the bank,
subject to the result of the receivership and the further
order of the court.

On the hearing the petitioner offered no evidence,
but counsel stated he had a witness, then said he had
from the city, by whom he desired to prove certain facts
alleged in the petition and not admitted by the answer. The
court thereupon dismissed the petition, and in doing so,
stated that in view of the pleadings it did not regard the
proposed testimony as material.

It is now contended by the petitioner, that the
facts used in not taking into consideration the facts
which counsel stated he desired to prove by the absent
witness.

Proof of the material allegations of the
petition not admitted by the answer was undisputed. The
petitioner having failed to make any necessary proof, and
no application for continuance having been made for the
purpose of producing the witness in question, there is
nothing in the record from which we can say that the court
erred in dismissing the petition. The order of dismissal
will therefore be affirmed.

APPROVED.

570 - 21968

WHITE OAK COAL COMPANY,
a corporation,

Appellee,

vs.

WILLIAM FOSTER BURNS and
MRS. MARY F. BURNS,
Appellants.

203 I.A. 434

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This action was brought in assumpsit against William Foster Burns and Mary F. Burns jointly. The jury found the issues for the plaintiff and judgment was entered thereon against both defendants, from which this appeal has been prosecuted.

The bill of exceptions having been stricken from the record on motion of appellee, there remains for our consideration only such points as are presented for review on the common law record.

It is contended that the court erred in entering judgment against both defendants.

The record shows that no service was had on the defendant William Foster Burns, and his appearance was not entered at any time, except as agent for Mary F. Burns. And while this is not denied by appellee, yet the point is made that the record contains evidence of conduct on the part of defendant William Foster Burns, which constituted an appearance on his behalf. In support thereof appellee directs our attention to the order denying the motion to file an additional plea, which order recites that the

2031.A.484

APPEAL FROM
COURTY COURT,
COON COUNTY.

Appellants,
WILLIAM TOSTER BURNS and
MARY F. BURNS,
vs.
Appellee,
WITH OAK CELL COMPANY,
a corporation.

THE COURT HEREBY DELIVERED THE OPINION OF THE COURT.

This action was brought in granulosa against
William Toster Burns and Mary F. Burns jointly. The jury
found the issues for the plaintiff and judgment was
entered thereon against both defendants, from which this
appeal has been presented.

The bill of exceptions having been stricken
from the record on motion of appellee, there remains for
our consideration only such points as are presented for
review on the common law record.

It is contended that the court erred in entering
judgment against both defendants.

The record shows that no service was had on the
defendant William Toster Burns, and his appearance was not
entered at any time, except as agent for Mary F. Burns.
And while this is not denied by appellee, yet the point is
made that the record contains evidence of contact on the
part of defendant William Toster Burns, when consideration
an appearance on his behalf. In support thereof appellee
directs our attention to the order denying the motion to
file an additional plea, which order recites that the

motion was made by the defendants, and argues that such recital must prevail over other inconsistent parts of the record. Under such circumstances, the word "defendants" contained in said order included only such defendants as had been served or had entered their appearance. (Correll v. Greider, 245 Ill. 378.) From a careful examination of the entire record, we are of the opinion that the defendant, William Foster Burns, was not properly before the court as a defendant in this case, and hence a valid judgment could not be entered against him.

It is a well settled rule, that where defendants are sued jointly, a judgment which is void as to one is void as to all. Clafflin et al. v. Dunne, 129 Ill. 241; Orrell v. Snyder, 174 Ill. App. 239.

The judgment must therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

motion was made by the defendant, and argues that such
 record must prevail over other inconsistent parts of the
 record. Under such circumstances, the word "defendant"
 contained in this order included only such defendant as
 had been served or had entered their appearance. (Huntley
 v. Greider, 245 Ill. 372.) From a careful examination of
 the entire record, we are of the opinion that the defendant,
 William Foster Smith, was not properly before the court as
 a defendant in this case, and hence a valid judgment could
 not be entered against him.

It is a well settled rule, that where defendants
 are sued jointly, a judgment which is void as to one is void
 as to all. Greider et al. v. Smith, 189 Ill. 241; Greider
v. Greider, 174 Ill. App. 237.
 The judgment must therefore be reversed and the
 cause remanded.

REVEREND AND HONORABLE,

203 I.A. 439

MARY KITTIER, As Administratrix
of the Estate of Charles P.
Kittier, Deceased,

Appellee,

vs.

CHICAGO & WESTERN INDIANA RAILROAD
COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

This was an action in case against the Chicago & Western Indiana Railroad Co., Chesapeake & Ohio Railway Co. of Indiana, (hereinafter known as the "C. & O.") and Chicago City Railway Co. (hereinafter known as the "C. C. Ry. Co.") to recover \$10,000 damages for the alleged wrongful killing of Charles P. Kittier, deceased. There was a trial by jury, resulting in a verdict finding the C. & O. and the C. C. Ry. Co., respectively, not guilty and finding the Western Indiana Railroad Co. (hereinafter known as the "Western Indiana") guilty, and assessing plaintiff's damages at \$10,000. Motions for a new trial and in arrest of judgment were overruled and judgment entered on the verdict. The Western Indiana appeals.

The Western Indiana urges as grounds for reversal in this case that (a) there was no evidence of any negligence on its part, (b) its negligence, if any, was not the proximate cause of the accident, (c) deceased was guilty of contributory negligence, (d) the jury were improperly instructed, (e) and each count of the declaration shows inconsistent causes of action.

At the time in question, the Western Indiana owned four tracks of railroad intersecting, in an easterly and westerly direction, certain street car tracks on Cottage Grove Ave. owned and operated by the C. C. Ry. Co. In regard to the respective location of the Western Indiana's tracks, the first, commencing at the north, was used for west bound freight, the second for east bound freight, the third for west bound passenger and the fourth for east bound passenger. About 45 feet south of these tracks were two tracks of the "Rock Island" Ry. Co. On the east side of Cottage Grove Ave. about 12 feet south of the Western Indiana's tracks and between same and the Rock Island tracks, stood a tower house, and a short distance to the north thereof, a "policeman's shanty". A gateman employed by the Western Indiana was stationed in the tower house. Ten feet to the north of the Western Indiana's tracks, and again ten feet to the south of the Rock Island tracks, gates, operated from said tower house, were maintained by the former company. The gateman stood within the tower house, on a floor elevated about 16 feet above the street's surface, from which he gave warning to persons and vehicles in that vicinity, of the approach of trains, by lowering said gates, and by ringing a bell placed in the tower house for that purpose. East of Cottage Grove Ave. and parallel therewith were the north and south bound tracks of the Ill. Cent. R. R. Co., and east of the latter's right of way, the Western Indiana's tracks slightly curved in a northerly direction. The north bound street cars on Cottage Grove Ave. ran on the east tracks and the south bound cars on the west tracks in said street. The C. & O. was accustomed to operate its trains on the Western Indiana's tracks. The accident in question happened about 7:45 P. M. on April 28, 1913. A freight train consisting of 40 to 60 cars, was slowly moving eastward (on the Western Indiana's

It was found in the station, the station Indian owned
 that traces of polished Indian, in an early and
 recently discovered, contain a great number of
 grave very small and covered by the U. S. in re-
 sponse to the respective location of the station Indian's
 traces, the first, containing of the north, was found for west
 point freight, the second for west point freight, the third
 for west point passenger and the fourth for east point
 passenger. About 15 feet north of these graves were two
 graves of the "Black Island" U. S. On the west side of
 Coats Grove Ave. there is a foot north of the station
 Indian's graves and between them and the Black Island traces,
 stood a tower house, and a short distance to the north there
 of, a "palisade" or "fence". A distance of about 100 feet
 Indian was situated in the tower house. The foot to the
 north of the station Indian's traces, was again the foot to
 the south of the Black Island traces, graves, contained from east
 tower house, were maintained by the tower house. The grave
 was found within the tower house, and a foot north of about
 15 feet above the grave's surface, from which he gave evidence
 to persons and visitors in the vicinity, of the appearance of
 traces, by lowering into graves, and by finding a hole placed
 in one tower house for that purpose. East of Coats Grove
 Ave. and parallel thereto were the north and south Indian
 traces of the U. S. Co., and west of the station
 light of west, the station Indian's traces slightly west
 in a northerly direction. The north tower house was on
 Coats Grove Ave. The south tower house was on the north point
 of the station Indian's traces. The U. S. Co. was
 situated in response to the station Indian's
 traces. The station Indian's traces were found about 15 feet N. W.
 of the U. S. Co. A foot N. W. of the station Indian's traces
 was found a foot north of the station Indian's traces.

second track from the north) across Cottage Grove Ave. The gates, north and south, were down. Two street cars stood at the north gates waiting to continue south, and the evidence tended to show that two north bound street cars similarly stood immediately south of the south gates. While the east bound freight train was passing over the crossing, the gateman received a signal from the tower man at Pullman Junction, a mile to the east, that a C. & O. passenger train was approaching on the track immediately south of the track upon which the east bound freight train was moving. One or two minutes after the gateman had received such signal, the rear of the freight train passed beyond the east line of Cottage Grove Ave. and thereupon the gateman raised the gates, and at the same time saw the on-coming headlight of the passenger engine east of the Ill. Cent. tracks, approaching at a speed which he estimated at 25 to 30 miles an hour. When the gates were opened, the first south bound car, and, the evidence tended to show, two north bound cars, passed over the railroad crossing in safety. There is some conflict in the evidence as to whether the car which was struck was the next to follow the first south bound car. There is also a conflict as to whether the conductor of the car that was struck preceded, or ran along side of, said car, but the evidence fairly tends to show that the conductor walked ahead of his car, and that it next followed the first south bound car. It was probably two or three minutes after the gateman learned that the passenger train was approaching when he raised the gates. The evidence also tends to show that the conductor, while standing a short distance to the south of the tower house, signalled his motorman to proceed south with his car, after the gates had been raised and the first south bound car had passed safely over the crossing. The engineer of the passenger

second track from the north) across Cottage Grove Ave. The gates, north and south, were down. Two street cars stood at the north gate waiting to continue south, and the evidence tended to show that the north bound street cars similarly stood immediately south of the south gate. While the east-bound freight train was passing over the crossing, the gates, and received a signal from the tower man at Pullman Junction, a mile to the west, that a U. S. G. passenger train was approaching on the track immediately south of the track upon which the east-bound freight train was moving. One or two minutes after the gatesman had received such signal, the rear of the freight train passed beyond the east line of Cottage Grove Ave. and thereupon the gatesman raised the gates, and at the same time saw the on-coming headlight of the passenger train east of the 111. West tracks, approaching at a speed which he estimated at 25 to 30 miles an hour. When the gates were opened, the first south bound car, and the evidence tended to show, two north bound cars, passed over the railroad crossing in safety. There is some conflict in the evidence as to whether the car which was struck was the next to follow the first south bound car. There is also a conflict as to whether the conductor of the car that was struck preceded, or ran along side of, said car, but the evidence fairly tends to show that the conductor walked ahead of his car, and that it next followed the first south bound car. It was probably two or three minutes after the gatesman learned that the passenger train was approaching when he raised the gates. The evidence also tends to show that the conductor, while standing a short distance to the south of the tower house, signalled his men to proceed south with his car, after the gates had been raised and the first south bound car had passed safely over the crossing. The engineer of the passenger

train did not see the car which was struck until the front of his engine was 50 to 75 feet east of Cottage Grove Ave. and until said car was within 10 to 15 feet north of the track upon which his train was running. The car that was struck was on the west track of Cottage Grove Ave. and it was not until the second north bound car on the east track passed beyond his vision to the north that he saw deceased's car, which then had almost reached the north rail of the track upon which the passenger train was approaching. At that moment the engineer reversed the power of his engine and applied the brakes, but too late to avoid striking the south bound car, resulting in the instant death of the motorman. The night in question was clear, and the gateman, from his position in the tower house, was enabled to watch the movements of the approaching trains. He testified, that after the passenger train had crossed the Ill. Cent. Tracks, 88 yards east of Cottage Grove Ave., he rang the tower bell, lowered the gates to the south, and then, as he turned to lower the north gates was prevented from doing so because the ^{that} car/was struck, (which he claimed to be the third car which attempted to proceed south) was under the gates. The evidence tends to show, however, that the motorman started his car forward while the gates were raised, and upon a signal from his conductor. The evidence not only tends to show that the gateman was negligent in raising the gates at a time when he saw the headlight of the engine rapidly approaching the crossing, but that such negligence was the proximate cause of the accident, even if deceased's conductor was also guilty of negligence. "Negligence may be the proximate cause of an injury of which it is not the sole cause. If the appellant's negligence concurred with some other event, other than appellee's fault, to produce the

train did not see the car which was struck until the front of his engine was 25 to 35 feet east of Cottage Grove ave. and until his car was within 10 to 15 feet north of the track when with his train was traveling. The car that was struck was on the east track of Cottage Grove ave. and it was not until the second north bound car on the east track passed beyond his vision to the north that he was awakened's car, which then almost reached the north rail of the track when which the passenger train was approaching. At that instant the engineer reversed the power of his engine and applied the brakes, but too late to avoid striking the north bound car, resulting in the instant death of the motorist. The night in question was clear, and the moon, from his position in the tower house, was enabled to watch the movement of the approaching train. He testified that after the passenger train had crossed the Ill. Cent. tracks, 35 yards east of Cottage Grove ave., he rang the tower bell. Immediately after the bell was rung, and soon, as he turned to look the north gate was prevented from closing by someone on the north gate, (which he claimed to be the third car of the passenger train) was under the gate. The evidence tends to show, however, that the motorist sought his car through while the gates were closed, and upon a signal from his conductor. The witness did only testify that the gate was negligent in raising the gates at a time when he saw the headlights of the engine rapidly approaching the crossing, but that such negligence was the proximate cause of the accident, even if deceased's conductor was also guilty of negligence. "Negligence may be the proximate cause of an injury or death if it is not the sole cause. If the negligent negligence connected with some other event, which then operates to produce the

injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the appellant is responsible even though its negligent act was not the nearest cause in order of time." C. & A. R. R. Co. v. Averill, 224 Ill. 516, 520-1, and cases therein cited.

It is a legitimate inference from all of the evidence that the accident would not have happened if the gateman had not raised the gates at the time in question. As said in Heiting v. C. R. I. & P. Ry. Co., 252 Ill. 466, "In the similar case of Hayes v. Michigan Central Railroad Co., 111 U. S. 223, the court, in discussing the very question now under consideration, said: 'It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as a cause of the injury. In the sense of an efficient cause, causa causans, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it causa sine qua non? - a cause which, if it had not existed, the injury would not have taken place, - an occasional cause? And that is a question of fact, unless the causal connection is evidently not proximate.' (Milwaukee & St. Paul Railroad Co. v. Kellogg, 94 U. S. 469)."

We are also of opinion that the evidence fairly tends to show that the deceased at and before the time in question, was in the exercise of reasonable care for his own safety. It is true, as contended by the Western Indiana's counsel, that he did not have the right to rely solely upon the direction given him by his conductor to start his car, and was bound to use a degree of care proportionate to the danger. It is also true, however, that "anticipation

of negligence in others is not a duty which the law imposes." G. C. Ry. Co. v. Fennimore, 199 Ill. 9. It seems evident that he could not have seen the approaching passenger engine until it emerged from the rear of the slowly moving east bound freight train. It is also evident that while attempting to run his car over the crossing his view to the east may well have been obstructed by the north bound street car, which the evidence tends to show narrowly escaped being struck by the passenger engine. When the gateman raised the north gates, it was an implied invitation from him to deceased to proceed to cross the Western Indiana's tracks, (G. & A. W. R. Co. v. McDennell, 194 Ill. 82). In considering further that in attempting to move his car over the crossing he was obeying the order of his conductor, it seems manifest under all the facts and circumstances in evidence, that the jury were warranted in finding that deceased was not guilty of contributory negligence.

The Western Indiana's counsel assigns as error the refusal of the trial court to give certain instructions tendered on behalf of appellant. The first refused instruction complained of sets forth that the defenses of assumed risk, fellow servant, and contributory negligence could not be availed of by the defendant G. C. Ry. Co., because it had elected not to come under the provisions of the Workmen's Compensation Act. As there was no intimation, either in any given instruction or otherwise, so far as the record discloses, that any of said defenses were not available to the Western Indiana, the refusal of such instruction did not constitute reversible error. The other refused instructions were upon the subject of contributory negligence and were fully covered by given instructions tendered by the latter Co. Furthermore, said refused instructions were either erroneous or contained only

of negligence in cases in which the law imposes."

U. S. v. [redacted], 1911, 11. 1. It seems evident that he could not have been the approaching passenger as the vessel it entered from the east was already moving westward in the channel. It is also evident that the vessel was not to run his car over the crossing his view to the east was still more obstructed by the north bound street car, which the witness tends to show correctly occupied being struck by the passenger engine. When the engine raised the north gate, it was an implied invitation from him to descend so proceed to cross the Western Indiana's tracks, (U. S. v. [redacted], 1911, 11. 1. 22). In fact, it is further stated in attempting to move his car over the crossing he was making the error of his conductor, it seems manifest under all the facts and circumstances in view, that the jury were warranted in finding that deceased was not guilty of contributory negligence.

The Western Indiana's counsel made no error in refusal of the trial court to give certain instructions suggested on behalf of appellant. The first refused instruction complained of sets forth that the duties of a conductor, fellow servant, and contributory negligence could not be availed of by the defendant U. S. v. [redacted], because it had already been held under the provisions of the statute's construction that as there was no intention, either in any given instruction or otherwise, so far as the record discloses, that any of said defenses was not available to the Western Indiana, the refusal of each instruction did not constitute reversible error. The other refused instructions were not the subject of contributory negligence and were fully covered by given instructions suggested by the State. Furthermore, said refused instructions were either unnecessary or contained only

abstract propositions of law.

It is also urged that the trial court erred in overruling the Western Indiana's motion in arrest of judgment, upon the ground that appellee's declaration and each count thereof stated two separate causes of action, one of which was against the defendant, C. C. Ry. Co., solely under the Workmen's Compensation Act, and the other of which was against the Western Indiana and the C. & O. under the Death by Wrongful Act statute. The verdict and judgment are against the Western Indiana only, and it is not contended, as to it, that the allegations of the declaration are not sufficient. The question as to whether a judgment could be sustained against the other defendants, or either of them, upon this declaration, is not presented on this record. In our opinion the Western Indiana has had a fair trial, free from prejudicial error, the verdict of the jury is warranted by the evidence, and the judgment of the Superior Court should therefore be affirmed.

AFFIRMED.

character of the

It is also noted that the first point noted in
concerning the Eastern Indian's claim to a right of prop-
erty, upon the ground that such a right is a common law
right, cannot stand the rigorous tests of law, and
of which was stated the substance, to wit, that, solely
under the common law, a right of property is not, and the other of which
was namely the Eastern Indian and the U. S. Government the
right is wrongful not stated. The verdict was judgment was
against the Eastern Indian claim, and it is not contended,
as to it, that the allegations of the Eastern Indian are not
sufficient. The question of whether a judgment could be
sustained against the other defendant, or either of them,
upon this consideration, is not presented as this record. In
the record the Eastern Indian has a claim, that
from judicial error, the verdict of the jury is reversed
by the evidence, and the judgment of the Eastern Indian claim
affirmed as affirmed.

REMARKS.

490 - 21888

SARAH LEVITAN.
Appellee.

vs.

CHICAGO CITY RAILWAY
COMPANY,
Appellant.

203 I.A. 441

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

STATEMENT OF FACTS. Appellee, while a passenger on a street car owned and operated by The Chicago City Railway Company, was injured by reason of said car colliding with a passenger train operated by the Chesapeake & Ohio R. R. Co., while the street car was moving over the grade crossing of the tracks of the Chicago & Western Indiana R. R. Co. on which the Chesapeake & Ohio R. R. Co. at that time ran its trains. An action for damages for said injuries was commenced by appellee against the foregoing companies and the Calumet & South Chicago Ry. Co. Suit was dismissed as to the Chesapeake & Ohio R. R. Co. There was a trial by jury and a verdict finding the Calumet & South Chicago Ry. Co. not guilty and the remaining defendants guilty and assessing plaintiff's damages at \$10,000. This is the separate appeal of The Chicago City Ry. Co. to review the correctness of that judgment. For a more detailed statement of facts as to the happening of the accident reference may be had to the case of Mary Kittler, Admx. v. C. & W. I. R. R. Co., #21803, opinion filed this day, which case arose out of the same occurrence. The evidence bearing on appellant's negligence in that case differs in some respects from that in the instant case, but this decision is not

144 .A.1 E02

1947 10 10
1947 10 10
1947 10 10

[illegible]

— 111 —

[illegible]

based on the question of appellant's negligence.

MR. JUSTICE MCGOWEN DELIVERED THE OPINION OF THE COURT.

[It ^{was} ^{defendant} urged by ~~appellant~~ that the trial court erred in giving the following instruction;

"The plaintiff is not bound to prove her case beyond a reasonable doubt, but is only bound to prove it by the preponderance of the evidence. The court instructs the jury that while, as a matter of law, the burden of proof is upon the plaintiff, and it is for her to prove her case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in her favor, although but slightly, it would be sufficient for the jury to find the issues in her favor."

~~It is insisted that this instruction left it to the jury to determine what constituted "plaintiff's case", regardless of whether that case was alleged in the declaration or not. A like objection to a similar instruction in the case of C. C. Ry. Co. v. Nelson, 215 Ill. 436, was held to be without substantial merit.~~

~~It is~~ ^{was} also urged that the court erred in giving the following instruction as to the measure of damages:

"If from the evidence and under the instructions of the court the jury find for the plaintiff then the jury will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should take into consideration all the facts and circumstances as shown by the evidence before them, the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence to be the direct result of the alleged accident, her suffering, if any, resulting from such physical injuries, if any, and such future suffering, if any, as the jury may believe from the evidence she has sustained or will sustain by reason of such injuries; her loss of time and inability to work, if any, on account of such injuries, and the jury may find for her such sum as they believe from the evidence and under the instructions of the court will be fair compensation for such injuries, if any, so far as such damages and injuries, if any, are alleged in the declaration and proved on the trial, and it is not necessary that any witness should express an opinion as to the amount of such damages."

The first criticism of this instruction is that it should

have limited the jury to a consideration of the evidence as to damages and not have authorized them to consider "all of the facts and circumstances as shown by the evidence before them." In the case of Garney v. Marquette Coal Mining Co., 260 Ill. 230, a similar expression was held to be inaccurate, but not misleading in that case. But when the damages are very high and apparently excessive, as in this case the use of such expression has usually been considered reversible error. (Pate v. Blair Big Muddy Coal Co., 158 Ill. App. 578, and cases therein cited.) One of the elements of damages enumerated in said instruction was appellee's loss of time on account of her injuries. She testified that before the accident she was a dressmaker and employed others to assist her in that work. There was no evidence offered as to the value of her services in the conduct of her business prior to her injury. She testified "I made \$20 to \$25 and \$40 a week above my expenses, during the season." The extent of her recovery upon this ground would be what her services were worth in the conduct of such business as she was engaged in, (C. C. Ry. Co. v. Flynn, 131 Ill. App. 502), and in the absence of more specific evidence as to the value of such services, it was misleading and prejudicial to instruct the jury that it was not necessary "that any witness should express an opinion as to the amount of such damages." Lyman v. C. C. Ry. Co., 176 Ill. App. 27.

Three other instructions, numbered 14, 15 and 16, given at the instance of appellant's co-defendant, were manifestly prejudicial to appellant and should not for that reason have been given in the form presented. Each directed a verdict for said co-defendant, the Western Indiana Co., if the jury found it was not negligent in certain respects specified therein. But each was prefaced with conditions

have limited the jury to a consideration of the evidence as
it was presented to them and not to a consideration of the
facts and circumstances as shown by the evidence but to
them. In People v. Gurney, 100 Cal. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

upon finding a certain state of facts pertaining wholly to appellant and in no way connected with the conditions upon which the verdict was directed. There was no logical connection between the conditions pertaining to appellant and a directed verdict as to its co-defendant, and they were apparently inserted for the purpose of intimating grounds upon which appellant might be found guilty, even if its co-defendant was discharged. While we do not say that the prejudice of itself constitutes ground for reversal in the present case, we cannot countenance this form of instruction.

The other alleged errors are not likely to arise on another trial and therefore need not be considered. Because of the reasons herein stated the judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

501 - 21899

SARAH LEVITAN,
Appellee,

vs.

CHICAGO & WESTERN INDIANA
RAILROAD COMPANY,
Appellant.

203 I.A. 444

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with #21888. There were two defendants, appellant and the Chicago City Railway Company. The judgment has this day been reversed and the cause remanded for a new trial as to the Chicago City Railway Co. in case No. 21888, which necessitates the same action with respect to appellant.

REVERSED AND REMANDED.

203 I.A. 444

ALBERTA FROM
VIRGIL GARDNER,
COOK COUNTY.

201 - 11111
ALBERTA FROM
VIRGIL GARDNER,
COOK COUNTY.

201 - 11111

This case was consolidated for hearing with
others. There were two defendants, Virgil and the
Chicago City Railway Company. The latter has been
sued for damages and the case transferred for a new trial
as to the Chicago City Railway Co. in a new trial.
which necessitates the same action with respect to
appealant.

ALBERTA FROM

203 I.A. 455

EMILY SCOTT,
Appellee,

vs.

UNITED ORDER OF FORESTERS,
Appellant.

APPEAL FROM

COUNTY COURT,

COCK COUNTY.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This suit was brought by Emily Scott against the United Order of Foresters on a certificate of membership in that organization to recover the sum of \$1000 on account of the death of her husband, Alexander Scott. Several pleas were interposed by the defendant company upon which issue was joined, and the case tried by jury. The verdict was for the plaintiff fixing her damages at \$1045, upon which the court after overruling defendant's motion for a new trial, and after plaintiff consented to a remittitur of \$45, entered a judgment for \$1000. Defendant appeals. There was evidence tending to show that Scott's death was caused by chronic alcoholism, although plaintiff and her mother testified that deceased did not take alcoholic drink for about five months immediately preceding his death. The benefit certificate in question was delivered by defendant to deceased Aug. 2, 1900, and provided, among other conditions, the applicant had assented to the "laws prescribed from time to time by the Supreme Court of the United Order of Foresters" and that they were made a part of the contract. At the time of Scott's death, July 31, 1914, there was in force and effect the following by-law adopted by defendant

2081.A.455

607 - 23005

ALCOHOL FROM
COUNTRY STORE,
COOK COUNTY.

UNITED ORDER OF WORKMEN,
vs.
EMILY SCOTT,
appellee.

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

This suit was brought by Emily Scott against the United Order of Workmen on a certificate of membership in said organization to recover the sum of \$1000 on account of the death of her husband, Alexander Scott. Several pleas were interposed by the defendant company upon which issue was joined, and the case tried by jury. The verdict was for the plaintiff finding her damages at \$1000, upon which the court after overruling defendant's motion for a new trial, and after plaintiff consented to a judgment of \$450, entered a judgment for \$1000. Defendant appeals. There was evidence tending to show that Scott's death was caused by chronic alcoholism, although plaintiff and her mother testified that deceased did not take alcoholic drink for about five months immediately preceding his death. The benefit certificate in question was delivered by defendant to deceased Aug. 2, 1900, and provided, among other conditions, that applicant had abstained from the "law prescribed from time to time by the Supreme Court of the United Order of Workmen" and that they were made a part of the contract. At the time of Scott's death, July 21, 1904, there was in force and effect the following by-law adopted by defendant

in July, 1910:

"No member of the Order entering or participating in any unlawful or foolhardy undertaking or being guilty of intemperate or immoral conduct, shall be entitled to receive any benefit from the Supreme Court, or from any High Court or from any Subordinate Court, for any injury or illness which may be directly or indirectly caused by such undertaking or conduct; and should his death be caused, directly or indirectly, by such unlawful or foolhardy undertaking, or by such intemperate or immoral conduct, or should his death occur while he is intoxicated, his benefit certificate shall lapse, become null and void, and no part thereof shall be paid to him or his beneficiaries."

The main question presented for our determination is - was deceased bound by this by-law, which was passed nearly ten years after the benefit certificate had been issued to him? If a contract of insurance is susceptible of two interpretations, courts will adopt the one which is most favorable to the assured. Switchmen's Union v. Colehouse, 227 Ill. 561; Terwilliger v. Masonic Accident Ass'n, 197 Ill. 9. It is only when a member in express terms agrees to be bound by constitutional amendments or by-laws as may thereafter be enacted that he is bound by future amendments or by-laws which impair the obligations of his contract injuriously. Covenant Mutual Life Ass'n v. Kentner, 188 Ill. 431; Baldwin v. Begley, 185 Ill. 180. In the absence of an express agreement the contract of membership cannot be impaired by subsequent changes effected by the association. Peterson, Admx. v. Gibson, 191 Ill. 365.

In the certificate granted by defendant in the instant case there was no express agreement that the assured should be bound by any future rules or laws. It states that certain provisions of the constitution and laws prescribed from time to time "Have been assented to." This may refer to only those then in existence. As said in

in July, 1910:

"The member of the Order entering or participating in any unlawful or foolish undertaking or being guilty of intemperance or immoral conduct, shall be entitled to receive no benefit from the lodge, or from any high court or from any subordinate court, for any injury or illness which may be directly or indirectly caused by such undertaking or conduct; and should his death be caused, directly or indirectly, by such unlawful or foolish undertaking, or by such intemperance or immoral conduct, or should his death occur while he is intoxicated, his benefit certificate shall lapse, become null and void, and no part thereof shall be paid to him or his beneficiaries."

The same question presented for our determination is - was he bound by this by-law, which was passed nearly ten years after the benefit certificate had been issued to him? If a contract of insurance is susceptible of two interpretations, courts will adopt the one which is most favorable to the insured. Whitcomb v. Union v. Life Ins. Co., 207 Ill. 307; Reynolds v. American Life Ins. Co., 197 Ill. 9. It is only when a member in express terms agrees to be bound by constitutional amendments or by-laws or by-laws that he is bound by future amendments or by-laws which limit the obligations of his contract theretofore. Whitcomb v. Union v. Life Ins. Co., 207 Ill. 307; Reynolds v. American Life Ins. Co., 197 Ill. 9. In the absence of an express agreement the contract of membership cannot be limited by subsequent changes effected by the association. Whitcomb v. Union v. Life Ins. Co., 207 Ill. 307. In the certificate granted by defendant in the instant case there was no express agreement that the member should be bound by any future rules or laws. It states that certain provisions of the constitution and laws prescribed from time to time "have been amended to." This may refer to only those laws in existence. It said to

Covenant Mut. Life Ins. Ass'n. v. Kentner, supra, "Even if the certificate states that the by-laws are a part of the contract and that they are subject to amendment, subsequent by-laws will be construed to apply only to contracts made after the adoption of such by-laws, in the absence of an agreement that they shall have a retrospective effect. This is upon the principle that all laws and by-laws have a prospective and not a retrospective effect, unless the intent that they shall have a retrospective effect is clear and unmistakable." Applying the foregoing rule to the instant case the clause, "Laws prescribed from time to time" does not, in our opinion, clearly refer to those subsequently enacted. Such a provision should be unequivocal in its terms, as in Baldwin v. Begley, supra, wherein the certificate contained the express condition that the member should comply with the rules then in force, "or that may hereafter be enacted. ***", We are of the opinion that the by-law in question is susceptible of two interpretations and it is therefore our duty to adopt that interpretation which will not impair the indemnity. We hold therefore, that said by-law did not become part of the said contract of insurance, and that deceased was not bound by it. In view of the conclusion arrived at, it is unnecessary to consider other alleged errors assigned by defendant, as it predicated its entire defense upon said by-law. The judgment of the County Court is therefore affirmed.

AFFIRMED.

Overland Nat. Life Ins. Co. v. Fidelity & Guaranty Co., 107 N. W. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

6203

2575
203 I.A. 471

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R H Dm Oct 5/16

BE IT REMEMBERED, that afterwards, to-wit: on

MAY 9 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6303.

203 I.A. 471

Harry E. Jarvis, appellee.

vs

Appeal from LaSalle.

G. & J. Coal Company, appellant.

Dibell, P. J.

Harry E. Jarvis brought this suit before a justice of the peace in LaSalle County against G. & J. Coal Company to recover a rental of Fifteen Dollars per year for the years ending July 22, 1913, 1914, and 1915 for certain coal mining rights beneath the surface of certain land pursuant to a written lease. In the circuit court on appeal the case was tried without a jury and plaintiff had a judgment for Forty Five Dollars, from which defendant appeals. No propositions of law were submitted and most of the rulings against appellant upon the admission of evidence are not of controlling importance. There is scarcely any dispute upon the facts.

In the summer of 1906 A. L. Irwin owned certain real estate. In July 1906 he sold about two acres of these lands to Fred Krist. Krist took possession, fenced the land and built a dwelling house on it and moved into it with his wife about October 1906 and remained in possession and ownership till the trial of this case in the circuit court, except as hereinafter stated. Krist finished paying for the land some time later and received a deed from Irwin and about 1912 received another deed to correct a mistake in the first deed. On July 22, 1911 Krist leased to Harry E. Jarvis, E. C. Gnahn and H. S. Alden the right to haul coal and other minerals through all entries passageways and openings in said land, the lease being in duplicate, Krist retaining one and the lessees the other. On May 10, 1912, said three lessees assigned their duplicate of said lease to Wilfred Coal Company. On September 5, 1914,

Harry E. Jarvis, appellee.

vs
Appeal from LaSalle.

G. & J. Coal Company, appellant.

Dibell, P. J.

Harry E. Jarvis brought this suit before a Justice of the peace in LaSalle County against G. & J. Coal Company to recover a rental of fifteen dollars per year for the years ending July 28, 1913, 1914, and 1915 for certain coal mining rights beneath the surface of certain land pursuant to a written lease. In the circuit court on appeal the case was tried without jury and plaintiff had a judgment for forty five dollars, from which defendant appeals. No propositions of law were submitted and most of the rulings against appellant upon the admission of evidence are not of controlling importance. There is scarcely any dispute upon the facts.

In the summer of 1908 A. L. Irwin owned certain real estate. In July 1908 he sold about two acres of these lands to Fred Krist. Krist took possession, fenced the land and built a dwelling house on it and moved into it with his wife about October 1908 and remained in possession and ownership until the trial of this case in the circuit court, except as hereinafter stated. Krist finished paying for the land some time later and received a deed from Irwin and about 1913 received another deed to correct a mistake in the first deed. On July 28, 1911 Krist leased to Harry E. Jarvis, E. C. Graham and W. B. Alford the right to haul coal and other minerals through all entries passageways and openings in said land, the lease being in duplicate, Krist retaining one and the others the other. On May 10, 1913, said three lessees assigned their duplicate of said lease to United Coal Company. On September 5, 1914,

Krist and wife conveyed to Harry E. Jarvis all the coal and other minerals underlying the surface of said land with the right to mine and remove the same and to perpetually use the passageways and entryways for all mining purposes in connection with other lands, and particularly for the purpose of conveying coal and other minerals through said passageways and entries and any others which it is desired to construct from other adjacent lands, but without damage to the surface. In said instrument they also conveyed all their rights as lessors in the lease above described. They also executed a separate instrument to Jarvis, in which they assigned to him the rents due the lessors under said lease for the three years ending July 22, 1915. The Wilfred Coal Company changed its name and is now the G. & J. Coal Company, hereinafter called the Company. By an instrument filed for record May 11, 1913, the Company conveyed its property to the Chicago Title & Trust Company to secure certain indebtedness, and among the properties which it conveyed was the leasehold interest of the company, acquired by virtue of said lease from Krist to Jarvis, Gnahn and Alden, and the assignment thereof to the company. The company operates a coal mine close to this land, and one of its main entries or passageways goes under a corner of this land. In 1907 and 1910 Irwin leased certain mining rights under his land to the company. Apparently some company had operated this mine many years before and had passed under the land here in question under some former lease from some other party, but there was no claim that they had any rights which were in existence in 1906, and if they have any rights, not dependent upon the lease from Krist, they were acquired under Irwin.

The principal defense is that the lease from Krist here sued upon is void. The lease in question granted the exclusive right to haul coal, etc. through all entries, passageways and openings

Krist and his conveyed to Harry E. Jarvis all the coal and other minerals underlying the surface of said land with the right to mine and remove the same and to perpetually use the passageways and entryways for all mining purposes in connection with other lands, and particularly for the purpose of conveying coal and other minerals through said passageways and entries and any others which it is desired to construct from other adjacent lands, but without damage to the surface. In said instrument they also conveyed all their rights as lessors in the lease above described. They also executed a separate instrument to Jarvis, in which they assigned to him the rents due the lessors under said lease for the three years ending July 22, 1912. The Wilfred Coal Company changed its name and is now the C. & J. Coal Company, hereinafter called the Company. By an instrument filed for record May 11, 1913, the Company conveyed its property to the Chicago Title & Trust Company to secure certain indebtedness, and among the properties which it conveyed was the leasehold interest of the company, acquired by virtue of said lease from Krist to Jarvis, Gahn and Allen, and its assignment thereof to the company. The company operates a coal mine close to this land, and one of its main entries or passageways goes under a corner of this land. In 1907 and 1910 Irwin leased certain mining rights under his land to the company. Apparently some company had operated this mine many years before and had passed under the land & was in question under some former lease from some other party, but there was no claim that they had any rights which were in existence in 1908, and if they have any rights, not dependent upon the lease from Krist, they were acquired under Irwin. The principal defense is that the lease from Krist here said upon is void. The lease in question granted the exclusive right to haul coal, etc. through all entries, passageways and openings

under the following described lands in the Village of Crotty LaSalle County, Illinois, to-wit: That part of the East Half of the North West Quarter of Section Twenty-three in Township Thirty-three North Range Five East of the Third Principal Meridian. lying north of the Chicago, Rock Island & Pacific Railroad right of way, west of Crotty's land, and south of the public highway, except the land heretofore sold to Norcross & Freeman: "Said land for further description being bounded on the north by the Marseilles highway, on the east by Crotty's land, on the west by the Frank Gettler land and on the south by the land heretofore mentioned as sold to Norcross and Freeman." In fact, the words "North west quarter" in said description should have been "North east quarter". That error is in all assignments of this instrument and all references thereto of record, and is supposed to have been in the original contract from Irwin to Krist and in the original deed from Irwin to X . Krist, to correct which Irwin gave Krist another deed about 1912. Irwin did not own any land in the northwest quarter the land he owned being in the northeast quarter. Appellant contends that, because of said mistake, the lease is void, and that neither the assignee of the lessees nor the assignee of the lessors acquired any rights by said assignments. We are of opinion that this position is not tenable. Under these instruments possession was at once taken of the land bounded on the north by the Marseilles highway, on the east by Crotty's land, on the west by the Frank Gettler land and on the south by the lands sold to Norcross and Freeman, and this land was in the Village of Crotty, (now Village of Seneca), in LaSalle County Illinois. These visible monuments furnished a complete and precise description of the land, and Krist took possession under that description, and of course his possession of the surface was also possession of the land underneath the surface,

under the following described lands in the Village of Crotty
 LaSalle County, Illinois, to-wit: That part of the East Half
 of the North West Quarter of Section Twenty-three in Township
 Thirty-three North Range Five East of the Third Principal
 Meridian, lying north of the Chicago, Rock Island & Pacific
 Railroad right of way, west of Crotty's land, and south of the
 public highway, except the land heretofore sold to Horrocks &
 Freeman; "Said land for further description being bounded on
 the north by the Marshall's highway, on the east by Crotty's
 land, on the west by the Frank Gattler land and on the south
 by the land heretofore mentioned as sold to Horrocks and Free-
 man." In fact, the words "North west quarter" in said des-
 cription should have been "North east quarter". That error
 is in all assignments of this instrument and all references
 thereto of record, and is supposed to have been in the original
 contract from Irwin to Krist and in the original deed from Irwin to
 Krist, to correct which Irwin gave Krist another deed about
 1916. Irwin did not own any land in the northwest quarter
 the land he owned being in the northeast quarter. Appellant
 contends that, because of said mistake, the lease is void, and
 that neither the assignee of the leasees nor the assignee of the
 lessor acquired any rights by said assignments. He is of
 opinion that this position is not tenable. Under these instru-
 menta possession was at once taken of the land bounded on the
 north by the Marshall's highway, on the east by Crotty's land,
 on the west by the Frank Gattler land and on the south by the
 lands sold to Horrocks and Freeman, and this land was in the
 Village of Crotty, (now Village of Seneca), in LaSalle County
 Illinois. Those visible comments furnished a complete and
 precise description of the land, and Krist took possession
 under that description, and of course his possession of the
 premises was also possession of the land underneath the surface,

owned by Irwin, from whom he bought it, and this lease constituted a valid grant of those rights under the surface of his land. Irwin granted other leases to the Company of land in the north east quarter after he had sold to Krist, but both these leases were limited to the land which he owned in the north east quarter, and therefore did not purport to convey the small piece of land which he had sold to Krist and of which Krist had taken possession. That possession was just as effective underneath the ground as on the surface and was notice to every one of his rights.

It seems that when Jarvis, Gnahn and Alden acquired this lease they were minority stockholders of the company and were taking the lease for the company, but such internal dissensions had arisen that they feared they would lose their rights in the company and therefore they took the lease to themselves, individually. It seems to be uncertain from the evidence, whether they made the subsequent assignment of their interest as lessees to the company by compulsion of a decree in equity or as a part of a voluntary settlement between themselves and the majority stockholders. They did relinquish all their interests in the Company, and as a part thereof, transferred their lessees' interest under this lease to the company. Afterwards Jarvis purchased the interest of Krist underneath the soil, as before stated, and became the owner of the mining rights and the assignee of the lessor in this lease. Appellant seems to contend that it was a fraudulent practice for Jarvis to buy and enforce the outstanding rentals of the coal mining and mining property underneath this land, after he had left the company. The president of the company as a witness expressed indignation at the conduct of Jarvis, who had ceased to be connected with this company before he purchased these rights from Krist, the lessor. His principal contention seemed to be

owned by Iwini, from whom he bought it, and this lease constituted a valid grant of those rights under the surface of his land. It is granted other leases to the Company of land in the north east quarter after he had sold to Krist, but both these leases were limited to the land which he owned in the north east quarter, and therefore did not purport to convey the small piece of land which he had sold to Krist and of which Krist had taken possession. That possession was just as effective underneath the ground as on the surface and was notice to every one of his rights.

It seems that when Jarvis, Graham and Alden acquired this lease they were minority stockholders of the company and were taking the lease for the company, but such internal arrangements had arisen that they feared they would lose their rights in the company and therefore they took the lease to themselves, individually. It seems to be uncertain from the evidence whether they made the subsequent assignment of their interest as lessees to the company by compulsion of a clause in equity or as a part of a voluntary settlement between themselves and the majority stockholders. They did relinquish all their interests in the Company, and as a part thereof, transferred their lessee's interest under this lease to the company. Afterward Jarvis purchased the interest of Krist underneath the coal, as before stated, and became the owner of the mining rights and the easings of the lessee in this lease. Apparently it seems to contend that it was a fraudulent practice for Jarvis to buy and enforce the outstanding rentals of the coal mining and mining property underneath this land, after he had left the company. The president of the company as a witness expressed indignation at the conduct of Jarvis, who had ceased to be connected with this company before he purchased these rights from Krist, the lessee. His principal contention seemed to be

that he could have defeated Krist or could have settled with him for some mere nominal consideration, if Jarvis had not intervened. We are of opinion that after Jarvis sold his stock and ~~is~~ left the company, he had a right to buy Krist's mining rights in this land, so far as the evidence in this record discloses, and that the purchase of the lessee's interest by the company and its recognition of its rights as lessee in its trust deed to the Chicago Title & Trust Company, shows that the Company is in under this lease and liable for this rental. By the terms of this lease, as we construe them, the rental was payable in advance, and three annual installments of Fifteen Dollars each were due before this suit was started.

The judgment is therefore affirmed.

that he could have testified Krist or could have settled with him for some mere nominal consideration, if Jarvis had not intervened. We are of opinion that after Jarvis sold his stock and left the company, he had a right to buy Krist's mining rights in this land, so far as the evidence in this record discloses, and that the purchase of the lessee's interest by the company and its recognition of its rights as lessee in its trust deed to the Chicago Title & Trust Company, shows that the Company is in under this lease and liable for this rental. By the terms of this lease, as we construe them, the rental was payable in advance, and three annual installments of fifteen dollars each were due before this suit was started. The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

628

2521

AT A TERM OF THE APPELLATE COURT,

203 I.A. 495

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R H Dyer Oct 5/16

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6287.

George E. Sadler,
Appellee,

-vs-

Jacob E. Schnellbacher,
Appellant.

203 I.A. 495

Appeal from Peoria.

Carnes, J.

Appellant, Jacob E. Schnellbacher, owned a three story store building in Peoria, Illinois, valued at \$150,000. In May, 1915, he leased the first, or street floor, and basement, and the top rear of the building, to A.S. Kresge, at a monthly rental varying in each five years of the term for twenty years. The aggregate rent contracted for was \$500,000, or double the value of the whole property. The usual and customary commissions charged in Peoria by brokers for renting real estate were shown by a witness introduced by appellee and not contradicted, to be two and one-half per cent. of the aggregate of the rentals, with a minimum of \$25. on business property. But in order to avoid the embarrassment of charging a commission greater than the value of the property in case of a very long lease the witness stated that if the aggregate rentals exceeded the value of the property the proper charge would be five per cent. of the value of the property. No calculation of the present value of sums of money to be paid in the distant future seems to be taken under consideration, but the witness stated that he could not tell what other agents did and was simply giving the rate that he would make on a deal. A computation under the above stated rule results in a commission charge of \$7500, figured either at two and one-half per cent. of the aggregate rentals, or five per cent. on the value of the building of which the property is a part.

1000-1000
1000-1000

- 5 -

was a part. George E. Sadler, the appellee, claims to have been the agent of appellant in the leasing of this property. He brought this action of assumpsit to recover commissions for his services in the matter. There was a verdict of \$7500. for appellee and a judgment against appellant on that verdict, from which this appeal is prosecuted.

The questions presented are mainly of fact or conclusions of fact to be drawn from undisputed evidence. Whether appellee was employed or acted for appellant depends upon the testimony of appellee, appellant, the tenant, Kresge, and Judge Martin, the attorney of appellant in the matter of leasing. It appears that appellee was a real estate broker occupying an office in Peoria with L. E. Thomas, another real estate broker; that they were not in partnership but as Thomas said, "We frequently match up deals, he representing one side and I the other." Prior to April 19, 1915, Thomas had been employed by Kresge, who lived at Detroit, to find a building in which he might locate a business. On that day he wrote to Kresge saying there was a good opening. Thomas was afterwards paid by Kresge for his services in obtaining the lease here in question.

Appellee testifies that he, knowing of this relation between Thomas and Kresge, went to appellant's line of business and introduced himself to him as a real estate agent and ^{him} /is his store was for lease, saying that he knew a man who would locate there, a good responsible party, and appellant told him that he had concluded "just yesterday" that he was going to move out of his location and the entire store room could be for rent. He then showed him over the building and said: "You have him and

5081A 482

was a party. George M. Kessler, the applicant, claims to have

been the agent of applicant in the leasing of this property.

No prompt action was taken by the Board of Commissioners for

the matter in the matter. There was a verdict of \$7500. for

applicant and a judgment against respondent on that verdict, from

which this appeal is prosecuted.

The questions presented are mainly of fact or conclusions

of fact to be drawn from undisputed evidence.

Police was employed or asked for assistance because upon the testi-

mony of applicant, respondent, the board, James, and other persons,

the necessity of assistance in the removal of the machine.

The applicant's own testimony is that he was in the office at

about 11:30 A.M. on the morning of the 19th of April, and

was not in partnership with respondent, and that he was

at the time, he was representing one side and I the other.

April 19, 1911, Thomas had been employed by James, and that

of Thomas, to find a building in which he might locate a place

where. On that day he went to George's office and saw a good

opening. Thomas was Thomas's wife or sister for his business

in obtaining the same in question.

Applicant testifies that he, knowing of the relation be-

tween Thomas and James, went to respondent's office on business and

introduced himself to him as a man who had been employed by

him since he was a boy, and that he was a man of good

character, a good business man, and a good man to have

one of his factories and the other side from which he was

the same person who was the witness who said that he was

hero. I can do business with him," to which appellee replied: "I will have this information in regard to the size of the room communicated to him and I will see you again."

There is no claim by appellee that appellant gave him any rate at which he would rent the building, or at this meeting that anything other than as above stated was said to indicate in what capacity appellee was to act in the matter. He says he there refused to tell appellant who the man was or what the business was. He testifies that following that conversation he told Thomas of the matter, who communicated with Kresge and received a letter back in a few days; that he, appellee, called on appellant again in April 22nd and told him the party wanted more definite information as to the building and appellant took him over the building and said: "I will fix this building any way this man wants it; if he wants metal ceiling, cement floor, I will remodel it as he wants it." That he, appellee, so told Thomas and Thomas forwarded the information to Kresge and Kresge came to Peoria April 24th and came to Thomas' office and he, appellee, went with Kresge to the store and introduced the parties and told appellant that Kresge was the man that wanted to rent the store. They arranged to meet in Judge Irwin's office in the afternoon, and did so meet; that Judge Irwin submitted a proposition to Mr. Kresge which was at first accepted and he, appellee, then said to appellant: "It now looks to me as though you were going to make a deal and I want a thorough understanding with you at this time in regard to my commission." He said, "What is your commission?" and I said, "The customary commission is 2½ per cent. of the gross amount," and appellant answered that he didn't think he ought to be called upon to pay a commission; that Mr. Kresge was the one that ought

There is no claim by appellee that appellant gave him any
rate at which he would rent the building, or at this meeting
any other than as above stated was said to indicate in what
capacity appellee was to act in the matter. He says he there
returned to tell appellant who the man was on that the business was
He testifies that following that conversation he told appellant of
the matter, who communicated with Kresge and received a letter
back in a few days; that he, appellee, called on appellant again
April 22nd and told him the party wanted more definite information
as to the building and appellant took him over the building and
said: "I will fix this building any way this man wants it; if
he wants retail ceiling, cement floor, I will remodel it and he want
it." That he, appellee, so told Thomas and also as I pointed out
information to Kresge and Kresge came to Kresge April 22nd and
came to Thomas; that he, appellee, went with Kresge to
the store and introduced the parties and told appellant that
Kresge was the man that wanted to rent the store. They then
to meet in Judge Twinn's office in the afternoon, and did so meet;
that Judge Twinn submitted a proposition to Mr. Kresge which was
at first accepted and he, appellee, then said to appellant: "I
now look to you as to what you were going to make a deal with I want
a thorough understanding with you as to the time in regard to my
consideration." He said, "What is your consideration? and I said,
"The consideration is 15 per cent. of the gross receipt."
and appellant answered that he didn't think he ought to be paid
upon to pay consideration; that Mr. Kresge was the one to pay

to pay the commission, and appellee answered, " I am not representing Mr. Kresge, and am not looking to Mr. Kresge for my commission." Then appellant suggested that he see Kresge and talk with him and see if he would pay the commission, and he accordingly did talk with Kresge, who said he ought not to pay the commission because he was the man that was renting the store room; that this conversation with appellant and Kresge was in another room out of the presence of each other; that after this talk with Kresge they went into the room where the business was being transacted and a mistake was discovered in the figures that they had agreed on, and the negotiations there ceased. Appellee does not claim that he said or did anything in regard to the matter at this time other than to introduce the parties and make this statement about commissions, or that he had ever done or said anything about it up to this point except as heretofore indicated, or that he had ever before told appellant that he was not acting for Kresge in the matter. He says he talked with appellant soon afterwards on the street and told him he was surprised at the attitude he took in regard to paying a commission, and appellant answered, " I don't pay commissions. I don't owe you a commission; and he replied if you at this time or any time close a deal with Kresge you owe me a commission; and appellant said it was absurd. Appellee also says that appellant talked with him about another property that he owned and said he wished he would try to find him a tenant. After leaving the stand and an intermission of the court, appellee returned to the witness stand and said he forgot to state while testifying that in his first conversation with appellant at Judge Irwin's office appellant said, " I am willing to pay you a reasonable amount but I think 2 1/2 per cent. is too much, and that 2 per cent. is the one

[illegible]

that ought to pay the commission." Afterwards the lease in question was executed at Detroit as a result of negotiations between the parties and Judge Irwin, in which appellee does not claim to have taken any part whatever.

On appellee's own showing he had nothing to do with the transaction except to aid Thomas, his office mate, to procure a location for his, Thomas', client, and introduce the tenant to appellant. There is nothing in appellee's testimony from which it can reasonably be inferred that appellant employed, or had any reason to suppose, he was acting as his, appellant's, agent before his demand for commissions. What effect should be given to appellee's testimony that appellant, at Judge Irwin's office, told him he was willing to pay a reasonable commission? Is it true? and if so, does it warrant the verdict? Appellant testifies that he made no such statement to him; that it is true that appellee took him into a private office and told him he looked to him for his pay, and he replied, "Not one cent from me. Do you think I look so though I need a conservator over me to attend to my business; what do I have Judge Irwin for? Not one cent," and left the room. Judge Irwin testified that after they were about to prepare the lease that was abandoned because there was a mistake in the figures before mentioned, appellee said something to Mr. Kresge about where he was going to get on with his commissions, and Kresge replied that appellant was the man that was renting, and he didn't know why he, Kresge, should pay commissions, and that if appellee had not made arrangements about commissions he had better do it now so that no misunderstanding would arise and asked if appellee had seen appellant

some extent to my own satisfaction. I have been in
question as a member of the staff, in which capacity I
have been able to take taken any part whatever.

On my office's own making as far as I am concerned, I have been
instructed on account to the fact, the office staff, to provide
information for me, the staff, the office staff, the office staff,
and I am. There is nothing in my office's history to which
it can reasonably be inferred that I am not, the staff,
any reason to suppose, he is not, the staff, the staff,
before the fact for consideration. The office staff would be
to the fact that any fact, the staff, the staff, the staff,
told him he was willing to pay a reasonable consideration. It is
true, and it is so, that it was not the staff, the staff, the staff,
like that he is, as much as the staff, the staff, the staff,
that the staff took his time, the staff, the staff, the staff,
looked to him for his part, the staff, the staff, the staff,
me. Do you think I look to the staff, the staff, the staff,
to the staff, the staff, the staff, the staff, the staff,
that was a fact in the staff, the staff, the staff,
the staff, the staff, the staff, the staff, the staff,
the staff, the staff, the staff, the staff, the staff,
the staff, the staff, the staff, the staff, the staff,
the staff, the staff, the staff, the staff, the staff,
the staff, the staff, the staff, the staff, the staff,
the staff, the staff, the staff, the staff, the staff,
the staff, the staff, the staff, the staff, the staff,
the staff, the staff, the staff, the staff, the staff,
the staff, the staff, the staff, the staff, the staff,

about that, and on his answering he said you had better do it, and that appellee called appellant into another room and told Irwin was called out for a moment and heard no more of that matter. Kresge testified as to the same transaction; -that he asked appellee if he had made arrangements about commissions and appellee said he would get his commissions from the other people; that he had no such understanding but that it was customary for the owner to pay the commission, and he, Kresge, told him that he had better have that understanding right now; that appellee had some conversation with appellant out of his hearing and afterwards, as they were leaving the building, told him that appellant was not willing to pay the commissions or a satisfactory commission, to him; that he, Kresge, had told appellee during the conversation in Judge Irwin's office that rather than have the matter upset he would give him a present of \$500. but appellant said he was entitled to his commissions and he expected to go appellant again and talk the thing over. It appears from other evidence that Kresge at the time did offer to pay appellee \$500., which offer appellee refused. We think it is unreasonable to believe that appellant at that time told appellee he was willing to pay him reasonable commissions. Instead of that fact being established by a preponderance of the testimony the great preponderance is against it. There was little reason for a seller to be dissatisfied if appellant there expressed a willingness to pay him reasonable commissions, even though appellant's idea of a reasonable commission may have been less than the amount of the verdict here. He might have well relied on his ability to prove the amount of a reasonable commission if they could not agree upon the exact sum. We are then from the whole testimony that at that time and place appellant might have been willing to pay appellee some small sum, not because he

From the whole I feel that the only way to get the best results is to have a plan of action, and to stick to it. I have been thinking of this a great deal lately, and I feel that I must do it. I have been thinking of this a great deal lately, and I feel that I must do it. I have been thinking of this a great deal lately, and I feel that I must do it.

was legally obliged to, but in consideration of what appellee had done in the matter, acting from the same spirit that moved Krasgo to offer him \$500. rather than have the matter fall through. Appellee would not accept anything short of an agent's commission, which appellant regarded absurd, and the matter dropped there. But even if appellant did say that he was willing to give him a reasonable commission, and even if that were an offer that could be regarded as binding on appellant in the absence of any other proof that he was under any obligation to pay him a commission, appellee did not accept the offer, and in his subsequent meeting with him stated, in substance, that he would not accept any view that appellant had expressed as to his, appellee's, rights in the premises.

Appellee argues that appellant is not reliable as a witness, and that Krasgo's testimony should be received with caution because he is appellant's tenant. There are some evident mistakes in appellant's testimony arising from such want of recollection of rather immaterial things as is likely to be found with men of large business. He states that he did not know appellee's name until the second time appellee called on him and did not know that he was a real estate broker. It may, nevertheless, be true that appellee did at the first interview state his name and business. If so, it was quite likely not to impress appellant as he naturally had no idea that he was entering into any business relation with him. Appellee testified that he had been in Morris ten years. It also appeared that he and Thomas had an office in the same building in which Judge Irwin's office was located. Judge Irwin testified that he did not know appellee before the day when he appeared with the parties in his office. Appellant's

statement of what occurred at the first interview with appellee seems to us much more reasonable than that of appellant insofar as the narrations differ. Appellant says that appellee came there and told him ~~if~~ he knew of a tenant that might rent the property and that he, appellant inquired who he was and what his business was, and appellee would not tell him, and he told appellee he did not know - that he was particular about who he rented to and that business was carried on there, and that any tenant within a league would have to be pretty carefully looked up by Judge Irwin; but he did show appellee around the premises and give him information about them to be imparted to his unknown applicant apparently in about the same way that he would have treated any respectable looking man that might have inquired of him about his property and his desire to rent the same. We see no reason for discrediting Kresge's testimony. It appears to be that of a fair-minded man with a clear recollection of what he is speaking about. He evidently had no idea that appellee was the agent of appellant in the matter until he spoke to him about commissions in Judge Irwin's office. He says when he went to Thomas' office on his arrival at Peoria to investigate the property Thomas introduced him to appellee saying that he, appellee, had seen the owner in reference to the property and would take him down and introduce him. There is no claim that appellee, at that time, indicated to Kresge in any way that he was the agent of the owner, or had any authority to speak for the owner in the transaction.

After a careful examination of the evidence we can reach no other conclusion than that it fails to support the verdict, and, in our opinion, is so clearly and manifestly against the evidence that it is our duty to reverse the judgment. We are also of the

opinion that no verdict for appellee on the facts contained in this record should ever be permitted by a court to stand; therefore, presuming that another trial could not result in materially different evidence as to the facts the case is not reversed. Reversed.

Finding of facts: We find that there was no contract, express or implied, between appellant and appellee in relation to any service to be rendered by appellee for appellant in relation to the renting of the property in question, and no contract, express or implied, by appellant to pay appellee for any services rendered.

...in ...
...on the fact ...
...by a court ...
...which could not result in ...
...the case is not ...

Principle of Law: We find that there was no contract, express or implied, between applicant and appellee in relation to any service to be rendered by appellee for applicant in relation to the making of the necessary arrangements, and no contract, express or implied, by applicant to pay appellee for any services rendered.

6297

AT A TERM OF THE APPELLATE COURT,

203 I.A. 496

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

2522

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

THE STATE OF NEW YORK
IN SENATE
January 14, 1903.
REPORT
OF THE
COMMISSIONER OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
MAY 1, 1899.

ALBANY:
J. B. LEECH, STATE PRINTER,
1903.

THE STATE OF NEW YORK
IN SENATE
January 14, 1903.
REPORT
OF THE
COMMISSIONER OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
MAY 1, 1899.

Gen. No. 6297

Adelia Carr, appellee.

203 T.A. 496

vs

Appeal from LaSalle.

Melvin Carr, appellant.

Carnes, J.

Appellee, Adelia Carr, brought this action in forcible detainer against her son, Melvin Carr, the appellant, before a justice of the peace to recover possession of the west half of the northwest quarter of section twenty ; and the south twenty acres of the west half of the southwest quarter of section seventeen in township thirty two north, range five east of the third principal meridian, in the town of Brookfield, LaSalle County, Illinois. She recovered a judgment there from which the appellant appealed to the circuit court where it was tried by the judge without a jury who entered a judgment in her favor, from which this appeal is prosecuted and a reversal sought on the ground that the judgment was against the evidence. No holdings of law were submitted and no error in the ruling on evidence is suggested.

It appears that March 16, 1914, a written lease between these parties of the premises was executed for a term expiring March first 1915, containing a covenant that appellant should deliver possession at the termination of the lease; that he did not then deliver possession and this suit was begun by ~~xxxxixxxxx~~ complaint filed three weeks thereafter. (March 23, 1915) Appellant offered proof that at the time of the leasing there was a family understanding that he should remain in possession during the lifetime of his mother and that he supposed the lease was drawn simply to show the terms under which he should continue to hold the property; that he had no knowledge or intimation to the

203 T.A. 496

Appeal from Decree.

vs

Alvina Carr, appellant.

Gen. No. 8397

Alvina Carr, appellee.

Carroll, J.

Appellee, Alvina Carr, brought this action in forcible detainer against her son, Melvin Carr, the appellant, before a Justice of the Peace to recover possession of the west half of the northwest quarter of section twenty; and the south twenty acres of the west half of the southwest quarter of section seventeen in township thirty two north, range five east of the third principal meridian, in the town of Brookfield, LaSalle County, Illinois. She recovered a judgment there from which the appellant appealed to the circuit court where it was tried by the Judge without a jury who entered a judgment in her favor, from which this appeal is prosecuted and a reversal sought on the ground that the judgment was against the evidence. No holdings of law were submitted and no error in the ruling on evidence is suggested.

It appears that March 10, 1914, a written lease between these parties of the premises was executed for a term expiring March first 1915, containing a covenant that appellant should deliver possession at the termination of the lease; that he did not then deliver possession. At this suit was begun by xxxxxxxxx complaint filed three weeks thereafter. (March 22, 1915). Appellant offered in evidence at the time of the hearing there was a family understanding that he should remain in possession during the lifetime of his mother and that he supposed the lease was given simply to show the terms under which he should continue to hold the property; that he had no knowledge or intention to deliver

contrary until he was served with the summons in this case the day after the complaint was filed; that he had done some work on the premises after the first of March with a view of preparing the land for a crop, and that his brother, who lived across the way from him, knew that he was doing this work with a view to staying on the premises and did not in any way inform him that he could not stay another year; that this brother was acting for his mother when the lease was executed and he supposed he was her attorney in fact to attend to the whole matter, and that notice to him of what he was doing was the same as notice to appellee. Appellee offered evidence denying that any such statements were made as to the permanency of the tenancy, and she herself testified that in the fall of 1914 she told appellant that he was only to stay that year, and she offered in evidence the power of attorney under which her son was acting in adjusting matters at the time the lease was made. The appellant objected to the admission of that document in evidence. Appellee's attorney stated that it was only offered to show or tending to show the circumstances surrounding the execution of the lease and the court sustained the objection, therefore it does not appear that any one other than appellee herself had any authority to make any promises as to anything other than what was contained in the lease, and there is no claim that she made any, and no claim that any were made after the execution of the lease.

The court might well have found that no such promise was made by anybody, or, if such a promise was made, it was by somebody not authorized by appellee to make it, or if made by somebody authorized that it was prior to and contemporaneous with the written instrument and therefore of no avail in this suit; therefore the court did not err in

contrary until he ascertained with the persons in this case
the day after the complaint was filed; that he had some
work on the premises after the first of March with a view of
preparing the land for a crop; and that his brother, who lived
across the way from him, knew that he was doing this work
with a view to staying on the premises and did not in any way
inform him that he could not stay another year; that this
brother was acting for his mother when the lease was executed
and he supposed he was her attorney in fact to attend to the
whole matter, and that notice to him of what he was doing was
the same as notice to appellee. A police officer offered evidence
showing that any such statements were made as to the permanency
of the tenancy, and she herself testified that in the fall of 1914 she told appellee that he was only to
stay that year, and she offered in evidence the power of
attorney under which her son was acting in negotiating a lease
at the time the lease was made. The same agent offered
to the admission of that document in evidence. Appellee's
attorney stated that it was only offered to show or
tending to show the circumstances surrounding the execution
of the lease and the court sustained the objection, therefore
it does not appear that any one other than appellee herself
had any authority to make any promises as to anything other
than what was contained in the lease, and there is no claim
that she made any, and no claim that any were made after
the execution of the lease.

The court might well have found that no such promise
was made by anybody, or, if such a promise was made, it was
by somebody not authorized by appellee to make it, or it
was by somebody authorized that it was after the lease was
temporarily with the witness instrument and therefore no
no avail in this matter therefore the court will not act in

disregarding that ground of defense.

The only other question is whether appellee lost her right to maintain this action by deferring the beginning of this suit for twenty one days. There is no claim that she did anything in that period to recognize appellant as her tenant or encourage him to do any work on the supposition that he was to remain in possession another year. When appellant held over after the expiration of his written lease without any new agreement he became either a trespasser or a tenant for another year at the election of appellee. If she had done anything to evidence an election to treat him as a tenant for another year she would have been bound by it, but she did not. The mere fact that she took no steps for three weeks ~~did~~ to regain possession does not raise an inference of a new tenancy. (C. & St. L. R. R. Co. v Wiggins Ferry Co. 82 Ill. 230; Condon v Brockway, 157 Ill. 91; Weber v Powers 213 Ill. 370)

Portions of the briefs are devoted to the discussion of a family controversy in relation to this and other matters that have no bearing on the issues here. Appellee is advanced in years but so far as this record shows she executed the lease to appellant and thereafter they were each of them bound by its terms precisely as though no family relation or controversy existed. The judgment is affirmed.

Affirmed.

disregarding that ground of defense.

The only other question is whether appellee lost her right

to maintain this action by deferring the beginning of this

suit for twenty-one days. There is no claim that she did

anything in that period to recognize appellee as her tenant

or encourage him to do any work on the land, or that he

was to remain in possession another year. When appellee

held over after the expiration of his written lease without

any new agreement he became either a trespasser or a tenant

for another year at the election of appellee. If she had done

anything to evince an election to treat him as a tenant

for another year she would have been bound by it, but she

did not. The mere fact that she took no steps for three

weeks did not constitute an election to treat him as a tenant

of a new tenancy. (C. & St. L. R. Co. v. Virginia Ferry Co.

82 Ill. 250; Condon v. Brockway, 157 Ill. 91; Weber v. Roberts

215 Ill. 370.)

Portions of the briefs are devoted to the discussion of

a family controversy in relation to this and other matters that

have no bearing on the issues here. Appellee is advanced in

years but so far as this record shows she executed the lease

to appellee and thereafter they were each of them bound

by its terms precisely as though no family relation or con-

troversy existed. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

THE UNIVERSITY OF CHICAGO
LIBRARY
1215 EAST 58TH STREET
CHICAGO, ILL. 60637
TEL. 773-936-5000
FAX 773-936-5001
WWW.CHICAGO.EDU

6255

2524

AT A TERM OF THE APPELLATE COURT,

203 I.A. 504

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6233.

203 I.A. 504

The People, etc.,

Defendant in error,

-vs-

Error to County Court
of DeKalb County.

Louis Peck,

Plaintiff in error.

Dibell, J.

Louis Peck was indicted by the grand jury of DeKalb county on October 31, 1914, for violating the statute relating to anti-saloon territory. The indictment was certified to the county court and Peck was there tried by jury and was convicted under counts numbered 10 and 14. A new trial was denied and a motion in arrest was denied, and there was a judgment against him for fines and imprisonment and an abatement of the place described in the 14th count as a nuisance. Peck has sued out this writ of error to review said judgment. He contends that the court erred in rulings on the testimony and on instructions, and that the evidence does not warrant the conviction.

Peck formerly ran a saloon on the first floor of No. 123 South California street in the city of Decatur, DeKalb County. He and his wife lived on the second floor. On May 7, 1914, that city became anti-saloon territory and Peck closed his saloon. After the supreme court had rendered its decision on June 16, 1914, in *Seown v. Gurnascki*, 233 Ill. 505, concerning the right of women to vote, Peck opened a soft drink parlor on said first floor, where he also sold cigars and tobacco. He employed the same two clerks who had

Gen. No. 6235.

2081.A.504

The People, etc.,
Defendant in error,

-vs-

Louis Beck,
Plaintiff in error.

Error to County Court,
of DeKalb County.

Dibell, J.,

Louis Beck was indicted by the grand jury of DeKalb County on October 31, 1914, for violating the statute relating to anti-saloon territory. The indictment was returned to the county court and Beck was there held to answer and was committed under process numbered 10 and 11. A trial was denied and a motion in arrest of error was denied. There was a judgment against him for fines and imprisonment and the statement of the place described in the fifth count as nuisance. Beck has sued out a writ of error to review said judgment. He contends that the court erred in refusing on the testimony and on instructions, and on the evidence to a not warrant the conviction.

Beck formerly ran a saloon on the first floor of No. 122 North California street in the city of Decatur, DeKalb County. He and his wife lived on the second floor. May 7, 1914, that day became anti-saloon territory and he closed his saloon. After the saloon closed the first its location on June 11, 1914, in *Beck v. Commonwealth*, No. 103, concerning the right of women to vote, Beck opened a soft drink parlor on the first floor, where he also sold cigars and tobacco. He occupied the same two rooms as the

formerly been his bartenders when he kept the saloon there. He had other business which engaged his attention much of the time, but he was there and conducted the place in person a part of the time. It is claimed that intoxicating liquors were sold after the place became anti-saloon territory, and before the finding of the indictment.

It is argued that the court erred in permitting the legal description of the property where this building stood to be given by parole. We are of opinion that the legal description could be given by any one who knew it, and that it was not necessary to introduce the record. The court permitted witnesses to state that during that period they had seen intoxicated persons come out of that place. We are of opinion that the court did not err in permitting that evidence to be introduced. It tended to show that they had obtained intoxicating liquor at Peck's place; and any witness is competent to express an opinion, if he has one, whether another person is intoxicated. *Dinick v Downs*, 82 Ill. 570; *Ward v Chicago St. Ry. Co.*, 237 Ill. 633. The People introduced in evidence a certified copy of a record of the revenue collector's office for the district in which Sycamore is situated showing the issue of a special stamp, or license, to L. E. Peck to carry on the business of a retail liquor dealer at 123 California Street, Sycamore, to cover the period from July 1, 1914, to June 30, 1915. It is argued that this was incompetent because there was no proof that it was posted in Peck's place of business. This contention

formerly been in possession of the land. He had then purchased the land and had it placed in a trust for him. It is claimed that the land was then sold to the defendant. The defendant claims that the land was sold to him before the finding of the jury.

It is stated that the court in the case of *Wheeler v. Wheeler*, 10 Cal. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

is overruled in People vs Brown, 275 Ill. 169. The court permitted the state to prove that plaintiff in error's full name is Louis E. Peck, and that he was commonly called L.E. Peck in Sycamore. It is urged that this was error. Counsel for plaintiff in error in examining one of his own witnesses called plaintiff in error L. E. Peck in his question. One of the instructions which the court gave at his request described plaintiff in error as L. E. Peck. The contention is without merit. It is claimed that error was committed by counsel for the People in asking Peck on cross examination whether he had violated this law at any time when it was formerly in force in Sycamore. The court sustained objections to every such question. As we elsewhere find it clear that Peck is guilty we think it unnecessary to consider what effect such questions might have in a doubtful case. Error is alleged in the ruling of the court which permitted the state to prove that Peck told a witness that he had sold whiskey to parties named, but that they did not dare ^{to} expose him; and also in admitting testimony that Peck tried to prevent a witness from testifying to the truth on this subject before the grand jury, and sought to shape his testimony so it would not include the selling of intoxicating liquor. We are of opinion that no error was committed by the court in receiving this testimony. It is argued that the court erred in reciting or repeating in the presence of the jury various portions of the testimony. The matter arose in this way. Objections were made to particular questions on the ground that the evidence was different from what was therein recited. In ruling on these objections the court frequently stated what he understood the evidence to be concerning which they

is overruled in People v. Brown, 173 Ill. 169. The court
must state to prove that plaintiff in error's bill
is Louis E. Beck, and that he was commonly called L. E. Beck in
Oxnard. It is urged that this was error. Counsel for
plaintiff in error in examining one of his own witnesses called
plaintiff in error L. E. Beck in the question. One of the in-
structions which the court gave at this request directed plaintiff
in error as L. E. Beck. The contention is without merit. It is
claimed that error was committed by counsel for the people in
calling Beck on cross examination whether he had violated the law
at any time when it was lawfully in force in Oxnard. The court
sustained objections to every such question. At no time during the
trial did the court permit plaintiff in error to ask any question
which would reflect such questions might have in a doubtful case. Error
is alleged in the ruling of the court which permitted the state
to prove that Beck told a witness that he had sold whiskey to
parties named, but that they did not dare ^{to} expose him; and also
in admitting testimony that Beck tried to prevent a witness
from testifying to the truth on this subject before the jury, and
sought to shape his testimony so it would not incriminate the
selling of intoxicating liquor. It is urged that the court
was committed by the court in receiving this testimony. It is
argued that the court erred in receiving or rejecting in the
presence of the jury various portions of the testimony. The
error in this way. Objections were made to portions of the
on the ground that the evidence was different from what was received.
In ruling on these objections the court properly
stated that he understood the evidence to be concerning what was

were contending. This was not erroneous, if the evidence was correctly stated. Hoch vs People, 219 Ill. 265. No doubt this practice should be sparingly indulged in by the court, but we are not able to say that the court misstated the evidence. Of course, the court only stated the substance, and not each word the witness had used. Our attention is not called to any place where any objection was made to the course pursued by the court in stating his view of the evidence on the disputed point. We find no error in that respect. The court refused to permit a witness to testify that Peck's place was kept in an orderly manner. The statute makes the sale of intoxicating liquors at such a place in anti-saloon territory a nuisance, and a case so proved cannot be defeated by also proving that it was quiet and orderly. Moreover, the plaintiff in error himself testified to the fact that he kept a quiet and orderly place there, and no one testified directly to the contrary.

Much objection is made to the instructions given for the People. Many of them are stock instructions, often approved before. Some of them are disposed of by the case of People v Brown, supra. It is contended that an instruction for the people included one day before the anti-saloon law went into force in Sycamore. The statute says that the act shall become operative on the thirtieth day after the day of the election at which it is adopted. This law was adopted in Sycamore April 7, 1914, and therefore became effective on May 7, 1914, and the instruction in question covered the period after May 6, 1914, to October 31, 1914, the day when the indictment was returned. The criticism therefore is not well founded. Moreover, if it were, it would

were conflicting. In a case not anonymous, if the evidence was
correctly stated, *John v. People*, 219 Ill. 285, 102 Am. 411,
Justice said: "It is not the duty of the court, but it is
not safe to say that this court misstated the evidence. Of course,
the court only stated the substance, and not each word of the
testimony. Our attention is not called to any place where any
objection was made to the evidence furnished by the party in question.
his view of the evidence on the disputed point. To find no error
in this regard. The court refused to permit a witness to testify
that 'Rock' place was held in an orderly manner. The statute
which the rule of interpretation requires at least a place in anti-
slavery territory a witness, and a case is cited coming to the
aid of the ruling that it was right and regular. Moreover,
the plaintiff in error himself testified to the fact that he kept
a list and over the place there, and no one testified directly to
the contrary.

Each objection in case to the introduction given for the
purpose. Many of them are stated in substance, others are stated
before, some of them are disposed of by the court in the
course of the trial. It is contended that the introduction for the
introduction and the defendant the defendant-law firm was held in
the same. The defendant says that the defendant is a person
on the trial after the day of the trial is which it
is accepted. This law was accepted in December 1891, 1914,
the defendant became effective on May 7, 1914, and the defendant
in question received the writ after May 6, 1914, to December 31,
1914, the defendant is a person who is a person. The defendant
therefore is not well founded. Moreover, it is not well founded.

not justify a reversal, because no sales of intoxicating liquor in that place were proved on that particular day, but the proof was of sales in June, July, August and September thereafter. Instruction No. 10 is objected to, but is sustained by *McCutcheon v People*, 69 Ill. 601, and *People v Brown*, supra. We conclude that the instruction requested by Peck and refused is covered by instructions given at his request.

The proof for the People showed numerous sales of whiskey by Peck and his clerks at that place after this anti-saloon law went into ~~any~~ effect and before the date when the indictment was returned. It showed admissions by Peck that he had sold whiskey to some of these people, coupled with the allegations that they did not dare to expose him. It showed that on several occasions drunken men had come from his place of business, and that drunken men had been carried out of the rear of his place of business and placed in a room near by to sleep off their debauch. It showed that people had looked in at the windows and seen persons inside drinking from whiskey glasses at the bar. It showed that Peck had sought to intimidate one of these men to prevent him from testifying against him on this subject before the grand jury. It showed that he had paid twenty-five dollars for a retail liquor dealer's license from the United States to cover this period of time. Peck himself testified that he had intoxicating liquor in his cellar during this time, and explained his taking out this retail liquor dealer's license as a measure of protection while he had that liquor in his cellar. The People proved that one of his clerks was seen carrying a pailful of bottles from his cellar and placing them behind the bar, and that a witness immediately obtained from the same place a bottle of whiskey which he paid for and drank. Peck

and justify a reversal, because no view of identification is more
in that place were proved on that particular day, but the
was of value in June, July, August and September thereafter. The
situation No. 10 is rejected, but is excluded by evidence
y people, 23 Ill. 601, and people v Brown, 1897. In 1911
that the investigation requested by which was refused is covered by
investigation given at this point.

The proof for the people showed numerous other of a kind
look and his clothing at that place after this mid-noon in 1911
into this effect and before the date when the indictment was
return. It is shown that the people had no other evidence
some of these people, coupled with the evidence that the
the date to which it is shown that the people had no other
Granger had come from his place at that time, and that
had been carried out of the rest of his place at that time
placed in a room where he is kept all these persons. It is
that people had looked in at the window and seen persons
drinking from whiskey glasses at the bar. It is shown that
had sought to identify one of these men as having been
testifying against him on the witness stand before the jury. It
shows that he had said that the man was a small man
Granger's likeness from the witness stand to which the witness
him. That himself testified that he had no other person in
his cellar during that time, and that he had no other person
recall about Granger's likeness as a witness of identification
had not looked in his cellar. The people were not allowed to
Granger was seen carrying a pistol in his hand from the cellar
and placing it in his pocket, and that the people had
directly obtained from the witness stand a picture of
drinking which he said for him during the trial.

and his clerks denied that they had sold any whiskey to anybody. The jury were the judges which set of witnesses to believe and we have no reasonable doubt that they correctly decided the issue. The fourteenth count, which was the nuisance count, described the place as No. 123 South California street in the city of Sycamore, and also described it by the legal description of the lot. The internal revenue stamp receipt described it as 123 California street, Sycamore, leaving out the word "south". The legal description was duly proved, but several of the witnesses left out the word "south" in naming the street and number. This apparent variance was not suggested in the court below, and there is no proof that there was another No. 123 California street except 123 South California street, and we find no ground for reversal in that slight difference in the description.

The judgment is affirmed.

and his clerks denied that they had sold any whiskey to anybody. The jury were the judges which one of witnesses to believe and have no reason to doubt that they correctly decided the issue. The fourteenth count, which was the nuisance count, described the place as 123 South California street in the city of Sacramento, and also described it by the local description of the lot. The internal revenue stamp receipt described it as 123 California street, Sacramento, leaving out the word "south". The local description in the jury process, but several of the witnesses left out the word "south" in making the street and number. This apparent variance was not objected to in the jury trial, and there is no proof that there was any other No. 123 California street except 123 South California street, and we find no ground for reversal in that slight difference in the description.

The judgment is affirmed.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

The following is a list of the names of the persons who
 have been appointed to the various offices of the
 Board of Directors of the City of New York, for the
 year 1900, as provided for by the Charter of the
 City of New York, Chapter 190, of the Laws of 1897.
 The names of the persons who have been appointed to
 the various offices of the Board of Directors of the
 City of New York, for the year 1900, are as follows:
 The Mayor of the City of New York, John A. B. Smith,
 has appointed the following persons to the various
 offices of the Board of Directors of the City of New
 York, for the year 1900:

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6253

2523

AT A TERM OF THE APPELLATE COURT,

203 I.A. 507

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R H Dec Oct 5/16

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

TO: H. H. H.

TO: H. H. H. (The Honorable)

TO: H. H. H. (The Honorable)

TO: H. H. H. (The Honorable)

TO: H. H. H. (The Honorable)

TO: H. H. H. (The Honorable)

TO: H. H. H. (The Honorable)

[Faint, illegible handwritten text, possibly a signature or address, with a large 'X' mark over it.]

TO: H. H. H. (The Honorable)

Gen. No. 6253

203 I.A. 507

These Brothers, appellees.

vs

Appeal from Peoria.

Newton Matthews, appellant.

Dibell, J.

These Brothers are in the teaming and transfer business in Peoria. Shanon had a shoe shining parlor standing on a piece of ~~his~~ a lot owned by Matthews. These Brothers moved that building to the street and around the corner and onto the rear of another lot owned by another party. They presented a bill for \$15.00 to Matthews for doing that work, which he refused to pay. These Brothers sued him before a justice and had a judgment and he appealed to the circuit court, where the case was tried without a jury and plaintiffs had another judgment from which the defendant appeals to this court.

Trussdale, bookkeeper for plaintiffs, testified that he had met defendant on several occasions and knew his voice and that defendant had a conversation with him over the telephone at plaintiff's office, which conversation he detailed. Defendant denied that he ever had a conversation with that office or with Trussdale over the telephone. Defendant insists that that proof has no probative force. Conversations over the telephone have been discussed by our supreme court in *Mills v Anderson*, 153 Ill. 263; *Goldair v Har National Bank* 225 Ill. 572; and by this court in *Rogers Grain Co. v Tanton* 153 Ill. App. 533; *Wicks v Wheeler*, 157 Ill. App. 376; *Trapp v Rockford Electric Co.* 186 Ill. App. 379; and *Estes v Estate of Cronin*, 196 Ill. App. There is an instructive discussion of the subject in 1 Chamberlayne on Evidence, Sec. 794. From these and other authorities it is clear that if a witness identifies the voice, the conversation over the phone is admissible, and its force as evidence depends on whether

These Brothers. In the testimony and transfer business

in Florida. Shanon had a shoe shining parlor standing on a piece of his lot owned by Matthews. These Brothers moved that building to the street and around the corner and onto the rear of another lot owned by another party. They presented a bill for \$15.00 to Matthews for doing that work, which he refused to pay. These Brothers sued him before a justice and had a judgment rendered against him, to the circuit court, where the case was tried without a jury and Matthews had another judgment rendered in his favor to this court.

Truesdale, bookkeeper for plaintiffs, testified that he had not retained on several occasions and knew his voice and that defendant had a conversation with him over the telephone at plaintiffs' office, which conversation is detailed. Defendant testified that he never had a conversation with that office or with Truesdale over the telephone. Defendant testified that that proof has no probative force. Conversations over the telephone have been discussed by our court in *Miller v Anderson*, 123 Ill. 101; *Cottrell v The National Bank*, 228 Ill. 528; and by this court in *Dugan v Dugan Co. v Tipton*, 103 Ill. App. 523; *Wicks v Wheeler*, 117 Ill. App. 376; *Trapp v Rockford Electric Co.*, 186 Ill. App. 375; and *Wicks v Tipton*, 103 Ill. App. 523. There is no comparative testimony of Cronin, 120 Ill. App. 375. There is no comparative testimony of any subject in *Chamberlaine on Evidence*, Sec. 724. From these and other authorities it is clear that it is not admissible to identify the voice, the conversation over the phone is admissible, and the force of evidence depends on the facts.

the jury believe the witness. The evidence of a blind man would not be unworthy of belief merely because he identified the speaker by his voice only.

Shahon had this small building at another place. Defendant had a vacant space of about ten feet between certain buildings owned by him, and Shahon wished to locate his building there. He and the defendant had negotiations on that subject and the rent to be paid was agreed upon. According to defendant's testimony, he was waiting to find out just how wide the building was. We think it clear that Shahon thought that defendant had consented to have the building placed on this vacant strip. One of the plaintiffs testified that defendant told him he had consented to let the building be placed there. Defendant did not deny this. Shahon hired plaintiffs to move the building to that spot and they did place it there, and Shahon paid them. After it had been there about three days, defendant wanted it moved away. Shahon testified that defendant told him to have it moved and he would pay the expenses. Truesdale testified that he, as bookkeeper for plaintiffs, received an order over the telephone from defendant to move the building and that he would pay the expenses. One of plaintiffs testified that the defendant said he would pay the expense of moving it the second time. Defendant testified that he never promised to pay the expense of moving the building. The trial judge found that the promise was proved. There were three witnesses against one, and he could not well have found otherwise. That the promise was made and the work was done in reliance thereon, must be considered as proved.

But defendant insists that plaintiffs committed a trespass when they placed that building on his land without his consent and that it was their duty to remove it, and that if he promised to pay for it such promise was without consideration.

The jury believe the witness. The evidence of a blind man would not be unworthy of belief merely because he testified the speaker by his voice only.

Shannon had this well building at another place. Defendant had a vacant space of about ten feet between certain buildings owned by him, and Shannon wished to locate his building there. He and his defendant had negotiations on that subject and the rent to be paid was agreed upon. According to defendant's testimony, he was waiting to find out just how wide the building was. We think it clear that Shannon thought that defendant had consented to have the building placed on this vacant strip.

One of the plaintiffs testified that defendant told him he had consented to let the building be placed there. Defendant did not deny this. Shannon hired plaintiffs to move the building to that spot and they did place it there, and Shannon paid them. After it had been there about three days, defendant wanted it moved away. Shannon testified that defendant told him to have it moved and he would pay the expenses. Thursday

testified that he, as bookkeeper for plaintiffs, received an order over the telephone from defendant to move the building and that he would pay the expenses. One of plaintiffs testified that the defendant said he would pay the expense of moving it the second time. Defendant testified that he never promised to pay the expense of moving the building. The trial judge found that the promise was revocable. There were three witnesses against one, and he could not well have found otherwise. That the promise was made and was not one in reliance thereon, must be considered as revocable.

But defendant insists that plaintiffs committed a trespass when they placed that building on the land without his consent and that it was their duty to remove it, and that it was promised to pay for it such promise was without consideration.

We do not accede to the correctness of that proposition as applied to the facts of this case, but it ignores the evidence already referred to that defendant consented to have the building placed on his lot. We hold that the proof shows a sufficient consideration to support the promise. The rulings of the court upon the propositions of law and fact were in harmony with these views.

The judgment is therefore affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6301

2526

AT A TERM OF THE APPELLATE COURT,

203 I.A. 508

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R H Durr Oct 17/16

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

6301.

Knight Light Company,
Appellant,

203 I.A. 508

-vs-

Appeal from Peoria.

C. M. Morrison,
Appellee.

LIBELL, J.

The Knight Light Company, a corporation, doing business in Chicago, hereinafter called appellant, received from Mrs. C. M. Morrison, hereinafter called appellee, an order prepared by appellant, dated September 19, 1913, and signed by appellee, for a soda fountain and for certain counters, cases, mirrors and other property connected with a soda fountain and candy cases, to be installed in her place of business in Peoria, and to conform to certain plans and specifications which appellant had prepared to appellee's satisfaction, for which she was to pay two thousand five hundred dollars, viz., one hundred dollars at the time of signing the order; seven hundred dollars on receipt of the goods or bill of lading for the same; four hundred dollars more between the date of said order and April 1, 1914, and thereafter thirty-seven dollars per month till the total of five hundred dollars was paid. When the goods were delivered appellee was to execute notes for the remaining payments and a chattel mortgage on the property and to insure the property and keep it insured at her expense, making the loss payable to appellant as its interest might appear, and to deliver the goods to appellant. The order provided that the title should remain

6211.

208 I.A. 208

United States Company,
of Chicago,

Special Agent

-v-

C. J. Morrison,
appellee.

1. 1111.

The United States Company, a corporation, having

business in Chicago, hereinafter called appellant, received

from Mrs. C. J. Morrison, hereinafter called appellee, an

order, purporting to be an order, dated November 12, 1914, and

signed by appellee, for a cash loan in the sum of \$100.00,

more or less, and other moneys, to be paid to appellant

and cashed, and to be included in the cash of appellant in

order, and to contain to certain place and special instructions

appellant had referred to appellee's satisfaction, but that the

was to pay two thousand five hundred dollars, viz., two thousand

dollars on the line of appellant - the order; seven hundred dollars

on receipt of the goods or bill of lading for the same; and

three hundred dollars more between the date of said order and 1915.

1915, and hereafter thirty-seven hundred and seventy-five dollars

five hundred dollars and no more. Then the order was signed

appellee and to execute notes for the remaining amount of

capital mortgage on the property now in issue, and to

keep it insured at her expense, and to deliver the same

to appellant as the interest thereon, and to deliver the same

to appellant. The order provided that the same should be

in appellant till the chattel mortgage was executed and delivered or until the purchase money was paid in full. The order was made subject to the approval of appellant. There was a blank at a certain place in the order for appellant to sign, evidencing its approval, and it did not sign that blank till two days before the trial of the present case. The goods were not in being when this order was made, and therefore were not, and could not be, examined by appellee. Appellant manufactured the parts relating to the soda fountain and obtained the rest of the goods elsewhere. It shipped them to Peoria knocked down and crated. Appellee paid appellant one hundred dollars with the order and seven hundred dollars for the bill of lading before the goods were ~~it~~ uncrated. Appellant sent men to Peoria to uncrate and install the goods. As soon as the uncrating began in the store of appellee, she declared that the goods were not according to contract. She was assured by the men in charge that they would be according to contract when they were all installed, and on those assurances she permitted the installation to proceed. Frequently during the installation she pointed out respects in which they did not at all conform to the specifications. At one time she ordered them to ship certain goods back to Chicago, but they replied that if they shipped any they would ship all, and she asked how she would get back the eight hundred dollars she had paid, and they gave her no satisfaction ~~about~~ on that subject. When these men claimed to have completed the installation they demanded that she execute notes and a chattel mortgage. She refused and said she would not accept the goods, and insisted that Knight, with whom she had placed the order, should come to Peoria and examine

the goods, but this he did not do. After some correspondence formal demand was made upon her in February, 1914, for the notes, chattel mortgage, insurance policies and four hundred dollars, and she declined to comply with the demand, but offered to return the goods upon the return to her of the eight hundred dollars which she had paid. Thereupon on February 28, 1914, appellant brought this action of replevin against appellee for said goods. Appellee gave a forthcoming bond and retained the goods. Appellant filed a declaration of two counts, one charging the unlawful taking and detention and the other the unlawful retention of the goods. The pleadings are not stated exactly correctly as to number, etc. in the abstract or briefs. There were in fact seven original and two additional pleas. The first three were non cepit and non detinet. There was a demurrer to two of the pleas and it was overruled and special replications were filed thereto, and appellant contends that the court erred in overruling the demurrer to one of those pleas, but that question was waived by replying thereto. Appellee relies upon its first additional plea, upon which issue was joined, and if that plea states a good defense and is established by a preponderance of the evidence the other pleas need not be discussed. In that plea appellee set out the contract and averred that therein appellant promised appellee that said goods were sound and fit for the purpose for which they were sold by appellant and bought by appellee, namely, ~~for~~ the purpose of running and operating said soda fountain and the candy store about to be operated by appellee, and that each of said articles and the installation thereof were to be of first class material and workmanship in every respect and that she entered into the contract and paid one hundred dollars and seven hundred dollars ~~in consideration of and for~~

the goods, but this he did not do. After some correspondence
to the goods was made upon him in February, 1914, for the goods,
existing contracts, insurance policies and four hundred dollars,
and the goods to comply with the terms, but offered to return
the goods upon the return to him of the other hundred dollars
which he had paid. Thereupon on February 28, 1914, appellant
brought this action of replevin against appellee for said goods.
Appellee gave a forthcoming bond and retained the goods.
Appellant filed a declaration of two counts, one charging the un-
lawful taking and detention and the other the unlawful conversion
of the goods. The pleading was not stated exactly correctly
to number, etc. in the first of the counts. There were in fact
seven articles and two additional pieces. The first piece was
not sold and not detained. There was a claim for two of the
pieces and it was averred that special receipts were given
therefor, and appellant contended that the goods were an over-
riding the number to one of those pieces, but that question was
waived by replying thereto. Appellee replied upon the first
additional piece, upon which there was judgment, and it was then
stated a good defense and is established by a preponderance of
the evidence the other pieces have not been delivered. In those
pieces appellee put out the contract of the goods that appellee
appellant promised appellee that said goods were sold and fit
for the purpose for which they were sold of appellee and bought
by appellee, namely, that the contract of sale and delivery was
made between the goods were sold to be returned by appellee
and that each of said articles and the transaction thereof was
to be of kind like stated and verifiably in every respect
and that one entered into the contract and one delivered
articles and were returned appellee.

and the further sum of fifty dollars, parcel of said twenty-five hundred dollars, in sole reliance on said promise; that said goods when delivered and installed in appellee's store were not sound and fit for said purpose and were not of first class material and workmanship, and the installation was of very inferior workmanship, and said goods so installed were of very inferior quality and not the class of goods contracted for; that they were wholly unfit for the purpose intended by reason of unsoundness, unfitness, poor workmanship and poor material, and that because of such failure of appellant to deliver and install the goods contracted for appellee was excused from performance of her part of the contract; that as soon as appellee ascertained this condition she offered to return the goods and has at all times since been ready and willing to do so upon appellant returning to her said money paid to her, but that appellant refused and refuses to return said money or any part thereof. The replication to said additional plea denied the allegations of poor material and workmanship above stated, and a similitur was filed to said replication. There was a jury trial and the issues were found for appellee. A motion for a new trial was denied and appellee had judgment and plaintiff below appeals.

Appellee incidentally contends that as appellant did not sign a written acceptance of the order till after the suit was begun the written contract was not in force and therefore she bought the goods verbally and owns the title thereto, and that this must defeat appellant. We hold that by manufacturing, shipping and installing the goods appellant impliedly accepted the order.

We concur with appellant that it owns the legal title.

to this property and that recoupment and set-off are not proper defenses to an action of replevin; and if any plea seeks to recover damages from appellant because the goods did not comply with the contract, no issue of that kind should have been permitted to be formed. But, although appellant owns the title, it may not replevy the goods unless the purchaser is in default or unless it first tenders back that which it has received from the purchaser. If appellant did not do that which it contracted to do, then appellee was not in default, and because she was not in default appellant could not re-possess itself of the property in an action of replevin without first returning what appellee had paid thereon. *Hamilton v. Singer Mfg. Co.*, 54 Ill. 370 was replevin for a sewing machine held by defendant under a conditional contract like the one here, on which twenty dollars had been paid, and it seems that machine was not as contracted for, and the court said: "The machine could not be recovered in an action of replevin without the payment of the twenty dollars advanced." *Iyers v. Bennett*, 103 Iowa, 569; *American Soda Fountain Co., v. Dorr Drug Co.*, 136 Iowa, 312; *Richardson v. Great Western Mfg. Co.*, 3 Kans. App. 445; *Richall v. Pursey*, 136 Minn. 461; *Heino Piano Co. v. Chopin*, 142 Calif. 609; and *Genelle v. Boulais*, 48 Wash. 310 are such much in point here, and especially *American Soda Fountain Co., v. Peer Drug Co.*, supra, which related to a soda fountain. The soda fountain was not as contracted for, and the vendee refused to pay certain money and execute her contract because the vendor had not complied with his part of the contract, and the sale being conditional, the vendor replevied the goods. It was held that the vendor was the only one in default; that the vendee

to this property and that respondent and appellant are not parties
 before to an order of revocation; and it was also stated by the
 court that respondent produced the same in support of his
 contention, no issue of this kind should have been presented to the
 court. And, although the court was divided, it was not without
 the court when the respondent is in default on appeal it is
 sufficient to say that when it was received from the respondent, it
 appeared to be that which it contained so as, then, respondent
 was not in default, and because the court in default of the
 court was not a party to the order, it is in default of the court
 in default of the respondent, and because the court was not in default
 of the respondent, it is in default of the respondent. And it is
 v. Singer, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

did not break the waistcoat because he was not to pay an amount
 notes till the operators stipulated for his release and that
 Replovin was not available to the reader under these circumstances.

The evidence here shows very clearly that the work done by the appellants was inferior to that called for by the contract and the workmanship was poor, and that appellee did not at all comply with its contract in those respects. It would carry to a great extent to recite the evidence of the various witnesses. Appellee complains that some questions were put that should not have been permitted, but we do not so hold; but if some of those criticisms were well founded, still by the whole record any fair and objective appraisal of the evidence would show a clear preponderance in favor of appellee. Appellant's abstract is exceedingly faulty in that it omits nearly all of the evidence introduced by appellee to show the defective character of the articles and of the workmanship. There have been supplied by an additional abstract filed by appellee. In appellant's abstract does not carry questions put by appellee and appellant's objection thereto and the granting of the motion and an exception, and then does not state whether or not the same was made to the question. As the answer was omitted, it is not shown that there was any error in those respects. One or two of the witnesses had not seen the goods till after they had been installed two years, but the contract warranted the goods to be as good as new for five years against all reasonable efforts at workmanship. Again, some of the evidence of the quality of work in using birch and poplar wood from the contract provided for was not shown. This could not reduce this defect.

[illegible]

with the contract. She had paid either eight hundred dollars or eight hundred and fifty dollars and the goods were in her store before she ever saw them except that on a visit to Chicago after the making of the contract she saw the inside only of the soda fountain. The goods were made after she gave the order, so that she could not see them when she gave that order. Upon her first discovery of defects, when the goods were uncrated, she offered to return them immediately if they would refund her money. Under the law she was entitled to that, but appellant refused it. Her money was in the goods and she would have been obliged to abandon her business unless she kept them as collateral until her money was refunded.

We find no reversible error in the record and the judgment is therefore affirmed.

Niehau, P.J. took no part.

With the contract. The two girls either eight hundred dollars
or eight hundred and fifty dollars and the boys were in the
same before she ever saw them except that on a visit to the
after the signing of the contract she saw the ladies only of the
code fountain. The girls were made after she gave the paper,
so that she could not see them, when she gave them. From
her first discovery of the code, when the girls were married,
she wanted to return them immediately if they would return her
money. Under the law she was entitled to that, but she did not
return it. Her money was in the goods and she would have been
obliged to abandon her business unless she had returned the money.
I do not think her money was returned.

We think reversible error in the record and the
judgment is therefore affirmed.
Alabama, 22. Look no part.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.



THE UNIVERSITY OF CHICAGO
LIBRARY
1215 EAST 58TH STREET
CHICAGO, ILL. 60637
TEL. 777-3000
FAX 777-3000
WWW.CHICAGO.EDU

61-3

2528

AT A TERM OF THE APPELLATE COURT,

2031.A. 514

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 12 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

AF 5-6-7815

...the ... of ...
...the ... of ...
...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...
...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...
...the ... of ...

Gen. No. 6183.

203 I.A. 514

Albert Richard, appellee

vs

Appeal from LaSalle.

Brunner Foundry & Machinery

Co. appellant.

Niehhaus, J.

This is an appeal from a judgment in a suit brought by the appellee, Albert Richard, in the Circuit Court of LaSalle County, against the appellant, the Brunner Foundry and Machinery Company, to recover damages, which appellee claims to have sustained on account of permanent injuries to his right eye, resulting from alleged negligence of the appellant. The jury on the trial of the case, returned a verdict finding appellant guilty, and assessing appellee's damages at \$5,000 and the court rendered judgment on the verdict; and this appeal is taken to reverse the judgment.

The negligence charged against the appellant is contained in three counts of the declaration; the first count charges, that the appellant failed and neglected to use reasonable care and caution in the prosecution of ~~xxx~~ its work; which was the putting in of new flues in a boiler; and, that by means of such negligence, the appellee was injured; the second and third counts charge that in the prosecution of its work, the appellant carelessly used an imperfect, defective and ragged drift pin; and that in consequence of using this imperfect and defective pin, the injuries to appellee were caused.

The injuries to appellee occurred in the boiler room of the St. Paul Coal Co. at Cherry, Illinois, where the appellee was employed as a fireman. This boiler room was a large room, in which there were six boilers. The appellant was engaged in put-

2031.A.514

Gen. No. 6183.

Albert Richard, appellee

Appeal from LaSalle.

vs

Brunner Foundry & Machinery

Co. appellant.

Nichols, V.

This is an appeal from a judgment in a suit brought by the appellee, Albert Richard, in the Circuit Court of LaSalle County, against the appellant, the Brunner Foundry and Machinery Company, to recover damages, which appellee claims to have sustained on account of permanent injuries to his right eye, resulting from alleged negligence of the appellant. The jury on the trial of the case, returned a verdict finding appellant guilty, and assessing appellee's damages at \$5,000 and the court rendered judgment on the verdict; and this appeal is taken to reverse the judgment.

The negligence charged against the appellant is contained in three counts of the declaration; the first count charges, that the appellant failed and neglected to use reasonable care and caution in the prosecution of xxx in its work; which was the putting in of new flues in a boiler; and, that by means of such negligence, the appellee was injured; the second and third counts charge that in the prosecution of its work, the appellant carelessly used an imperfect, defective and ragged drift pin; and that in consequence of using this imperfect and defective pin, the injuries to appellee were caused.

The injuries to appellee occurred in the boiler room of the St. Paul Coal Co. at Cherry, Illinois, where the appellee was employed as a fireman. This boiler room was a large room, in which there were six boilers. The appellant was engaged in put-

ting in new flues for the St. Paul Coal Co. in Boiler No. 6 and the appellee was at work at boilers Number 4 and 5, adjacent. At the time of the injury, appellant's employees were engaged in the act of expanding a new flue, which they were putting in boiler No. 6. This new flue was being expanded at the face of the boiler, and the expanding was done by placing an expander, (which is a round tube about a foot in length) into the end of the flue; then pounding into the expander a steel drift pin, about 6 or 7 inches in length. The drift pin is a tool which tapers toward the end, which is inserted into the expander; and is larger at the other end, which is the head, and which is pounded by a sledge hammer, with such force as to gradually drive the pin into the expander and thereby expand the flues and tighten them in the boiler. A drift pin when properly made for the work, should be of hardened steel, at the smaller end; the head should properly be of steel sufficiently soft to prevent the chipping and flying off of steel particles, by the concussion of the pounding.

The evidence tends to show, that while the appellee was engaged in performing his duties as fireman at the boilers Numbers 4 and 5, about 15 feet away from the place where appellants' employees were at work expanding the flue in boiler No. 6, that a small particle of steel flew off from the pounding of the drift pin, and struck appellee's right eye, causing injuries from which blindness of this eye resulted.

The testimony of the experts who were called by the appellant, is to the effect, that the drift pin involved in this case, was properly made for its use and purpose; the steel being hardened at the small end, and sufficiently soft at the head end; so that in the ordinary and proper use, which would be made of the pin in the expanding of the flues, there

ting in new lines for the St. Paul Coal Co. in Boiler No. 6
 and the appellee was at work at boilers Number 4 and 5, adja-
 cent. At the time of the injury, appellant's employees were
 engaged in the act of expanding a new line, which they were
 putting in boiler No. 6. This new line was being expanded at
 the face of the boiler, and the expanding was done by placing
 an expander, (which is a round tube about a foot in length)
 into the end of the line; then pounding into the expander a
 steel drift pin, about 6 or 7 inches in length. The drift pin
 is a tool which tapers toward the end, which is inserted into
 the expander; and is larger at the other end, which is the
 head, and which is pounded by a sledge hammer, with such force
 as to gradually drive the pin into the expander and thereby
 expand the lines and tighten them in the boiler. A drift pin
 when properly made for the work, should be of hardened steel,
 at the smaller end; the head should properly be of steel
 sufficiently soft to prevent the chipping and flying off of
 steel particles, by the concussion of the pounding.
 The evidence tends to show, that while the appellee
 was engaged in performing his duties as fireman at the boilers
 Number 4 and 5, about 15 feet away from the place where
 appellant's employees were at work expanding the line in boiler
 No. 6, that a small particle of steel flew off from the pounding
 of the drift pin, and struck appellee's right eye, causing in-
 juries from which blindness of this eye resulted.
 The testimony of the experts who were called by the
 appellant, is to the effect, that the drift pin involved in
 this case, was properly made for its use and purpose; the
 steel being hardened at the small end, and sufficiently soft
 at the head end; so that in the ordinary and proper use, which
 would be made of the pin in the expanding of its lines, there

would be no danger of steel particles flying off, when the pin was pounded by the sledge hammer. The testimony of the experts however, also tends to prove, that particles of steel might fly off by an improper or negligent pounding of the pin by the sledge hammer. Otto J. Sentfelter testified, referring to steel flying off of the drift pin by pounding, "it would not fly off unless it was a glancing blow on the edge of it, that would break a piece off; and that would not cause it to fly unless it would strike something, and glance off." Albert Hasse, another expert, testified in answer to the question as to what effect the striking of by a sledge hammer would have on the pin in question, that it would all depend, on how the pin was struck, and, that in one way of striking it with a hammer, a piece might fly a couple of feet; but Andrew H. Neureuther another expert, testified, that "it would be hard to take that pin and say whether any pieces of steel have broken off; and how they broke off, and whether they went one foot or how far."

This evidence together with the fact, which is also in proof that particles of steel repeatedly flew through the air from the pounding, makes it appear very probable, that there must have been an improper or careless striking of the pin with the sledge-hammer, in consequence of which, a particle of steel was sent flying through the air, and struck appellee's eye. And ~~this~~ this view is strengthened also, by the evidence, that the manipulator of the sledge hammer, was wholly inexperienced in that line of work, and admits, that he made at least one foul stroke at the pin with the sledge hammer.

There is, therefore evidence tending to prove the allegation of negligence made in the first count of the declaration

Appellant also contends, as a ground for reversal, that the court admitted improper evidence on the part of the appellee as to the possible results of the injury; whether the injury

would be no danger of steel particles flying off, when the pin was pounded by the sledge hammer. The testimony of the experts, however, also tends to prove, that particles of steel might fly off by an improper or negligent pounding of the pin by the sledge hammer. Otto J. Gentzler testified, referring to steel flying off of the drift pin by pounding, "it would not fly off unless it was a glancing blow on the edge of it, that would break a piece off; and that would not cause it to fly unless it would strike something, and glance off." Albert Haase, another expert, testified in answer to the question as to what effect the striking of a sledge hammer would have on the pin in question, that it would all depend, on how the pin was struck, and, that in one way of striking it with a hammer, a piece might fly a couple of feet; but Andrew H. Neuenhofer, another expert, testified, that "it would be hard to take that pin and say whether any piece of steel have broken off; and how they broke off, and whether they went one foot or how far." This evidence together with the fact, which is also in proof that particles of steel repeatedly flew through the air from the pounding, makes it appear very probable, that there must have been an improper or careless striking of the pin with the sledge hammer, in consequence of which, a particle of steel was sent flying through the air, and struck appellee's eye. And that this view is strengthened also, by the evidence, that the manipulator of the sledge hammer, was wholly inexperienced in that line of work, and admits, that he made at least one foul stroke at the pin with the sledge hammer.

There is, therefore evidence tending to prove the allegation of negligence made in the first count of the declaration. Appellant also contends, as a ground for reversal, that the court admitted improper evidence on the part of the appellee as to the possible results of the injury; whether the injury

might possible result in necessary removal of the eye; and what effect it might possibly have on the remaining eye, with reference to developing sympathetic iphtalmia. While the answers of Dr. Woodruff in this regard, and concerning what might possibly happen, in the future, must be regarded as incompetent, they were so regarded by the trial court, and excluded. There is nothing in the record from which this court could reasonably infer, that the jury took the excluded testimony into consideration, in finding their verdict, or were in any influenced by it. No error is therefore apparent, on that ground. It is true, there are cases, where certain incompetent statements made by a witness, even though excluded, might ~~ex-~~prejudicially affect the rights of a defendant in a personal injury case; but that does not appear to have been the case here.

The amount of damages fixed in the verdict is not excessive, considering the grave character of the actual injury to the appellee, and its disastrous consequences to him.

For the reasons stated, the judgment should be affirmed.

Affirmed.

Carnes, J. dissents.

might possible result in necessary removal of the eye; and what effect it might possibly have on the remaining eye, with reference to developing sympathetic ophthalmia. While the answers of Dr. Woodruff in this regard, and concerning what might possibly happen, in the future, must be regarded as incompetent, they were so regarded by the trial court, and excluded. There is nothing in the record from which this court could reasonably infer, that the jury took the excluded testimony into consideration, in limiting their verdict, or were in any influenced by it. No error is therefore apparent, on that ground. It is true, there are cases, where certain incompetent statements made by a witness, even though excluded, might prejudicially affect the rights of a defendant in a personal injury case; but that does not appear to have been the case here.

The amount of damages fixed in the verdict is not excessive, considering the grave character of the actual injury to the appellee, and its disastrous consequences to him.

For the reasons stated, the judgment should be affirmed.

Affirmed.

Garnes, J. dissents.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6244

2527

AT A TERM OF THE APPELLATE COURT,

203 I.A. 515

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois;

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 12 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6244

203 I.A. 515

E. Meers, appellee

vs

Appeal from Will.

Edward J. Daley, appellant.

Niehau, P.J.

This is an action in assumpsit, brought by E. Meers, the appellee, against Edward J. Daley, the appellant to recover fees for services rendered by appellee as attorney for appellant. The declaration consists of the common counts, to which a specific bill of particulars was added under a rule of the court. The appellant pleaded the general issue, and payment. The case was tried by a jury, which returned a verdict assessing appellee's damages at \$2,000. The appellant thereupon made a motion for a new trial, which was overruled, and the court entered judgment upon the verdict, for the sum of \$2,000; from which judgment an appeal was taken to this court.

Various questions are raised on the appeal, but the chief contentions of the appellant, are that the verdict is not supported by the evidence, and that some of the instructions given were erroneous.

It appears from the evidence that John Daley, a farmer living near Lockport, in Will County, died testate, about the 24th. day of February 1913. The will which he left disposed of property amounting in value to about \$150,000. He left no widow; but left the following surviving children: Edward J. Daley, who was named as Executor in the will; Thomas Daley Mrs. Margaret McCoy, and Mrs. Susan Bush. By the terms of the will, he left Edward J. Daley 345.76 acres of land, subject to the payment of a legacy of \$4,000 to the appellants sister Mrs. Susan Bush; to his son Thomas Daley, he devised 199.74 acres of land; and to his daughter Margaret McCoy, only the

E. Meers, appellee,

Appeal from Will.

vs

Edward J. Daley, appellant.

Nicholas, P.J.

This is an action in assumpsit, brought by E. Meers, the appellee, against Edward J. Daley, the appellant to recover fees for services rendered by appellee as attorney for appellant. The declaration consists of the common counts, to which a special bill of particulars was added under a rule of the court. The appellant pleaded the general issue, and payment. The case was tried by a jury, which returned a verdict assessing appellee's damages at \$2,000. The appellant thereupon made a motion for a new trial, which was overruled, and the court entered judgment upon the verdict, for the sum of \$2,000; from which judgment an appeal was taken to this court. Various questions are raised on the appeal, but the chief contentions of the appellant, are that the verdict is not supported by the evidence, and that some of the instructions given were erroneous.

It appears from the evidence that John Daley, a farmer living near Lockport, in Will County, died testate, about the 24th day of February 1913. The will which he left disposed of property amounting in value to about \$150,000. He left no widow; but left the following surviving children: Edward J. Daley, who was named as Executor in the will; Thomas Daley, Mrs. Margaret McCoy, and Mrs. Susan Bush. By the terms of the will, he left Edward J. Daley 345.78 acres of land, subject to the payment of a legacy of \$4,000 to the appellee; Mrs. Susan Bush; to his son Thomas Daley, he devised 120.74 acres of land; and to his daughter Margaret McCoy, only the

sum of \$100. The testator devised some of his property to his grandchildren, namely, to the children of a deceased son, David Daley, a farm of 113 acres; to the six children of the appellant, he bequeathed the sum of \$500. each, and also some real estate in the city of Lockport. The residue of his estate was also devised to the children of the appellant. The will was made on March 4, 1905 and the testator at that time was 80 years of age.

Under the provisions of the will, it is apparent that appellant received the larger part of his father's estate; and that his children received most of the personal estate, amounting perhaps to the sum of \$20,000. After the will had been admitted to probate, the letters testamentary issued to the appellant, and an inventory of the real and personal property filed and approved by the Probate Court, the testator's son, Thomas Daley, and his daughter, Margaret McCoy, filed a bill in equity in the Circuit Court of Will County, to set aside the will, making the appellant, and all the children and grandchildren of the testator, parties defendant to the bill. The bill charged, that the appellant and his wife used undue arts and fraudulent practices, and resorted to falsehood and misrepresentation, to induce the testator to execute the will in question; and that he was kept under improper restraint by them; and that they exercised an undue influence over him; also, that his mind and memory were so impaired by an excessive use of intoxicating liquors, that he was on that account, incapable of making a proper distribution of his estate.

Appellee was retained as solicitor to act for the appellant, in the matter of the contest of the will mentioned. The evidence shows, that he took leading charge of the litigation, being assisted, however, by William W. North, in

sum of \$100. The testator devised some of his property to his grandchildren, namely, to the children of a deceased son, David Daley, a farm of 113 acres; to the six children of the appellant, he bequeathed the sum of \$500. each, and also some real estate in the city of Lockport. The residue of his estate was also devised to the children of the appellant. The will was made on March 4, 1908 and the testator at that time was 80 years of age.

Under the provisions of the will, it is apparent that appellant received the larger part of his father's estate; and that his children received most of the personal estate, amounting perhaps to the sum of \$30,000. After the will had been admitted to probate, the letters testamentary issued to the appellant, and an inventory of the real and personal property filed and approved by the Probate Court, the testator's son, Thomas Daley, and his daughter, Margaret McCoy, filed a bill in equity in the Circuit Court of Will County, to set aside the will, making the appellant, and all the children and grandchildren of the testator, parties defendant to the bill. The bill charged, that the appellant and his wife used undue arts and fraudulent practices, and resorted to falsehoods and misrepresentation, to induce the testator to execute the will in question; and that he was kept under improper restraint by them; and that they exercised an undue influence over him; also, that his mind and memory were so impaired by an excessive use of intoxicating liquors, that he was on that account, incapable of making a proper distribution of his estate.

Appellee was retained as solicitor to act for the appellant, in the matter of the contest of the will mentioned. The evidence shows, that he took leading charge of the litigation, being assisted, however, by William A. North, in

looking after the defense to be made against the charges in the bill of complaint; that he took the necessary steps, by proper investigation of the legal questions involved, and an inquiry into the facts; and ascertained and examined the various witnesses, who were supposed to have knowledge of the matters put in issue by the averments of the bill; and that he rendered valuable and successful service to his client, which finally culminated in procuring a settlement of the litigation that was quite favorable to the interests of the appellant. Appellee had received in all the sum of \$500.00 for his services prior to the commencement of this suit.

To establish the value of his services, the appellee called a number of leading practitioners of the Will County bar, who testified, that the usual and customary fee charged and paid for such services as were rendered by appellee, was from \$3000 to \$3500. The hypothetical question under which the testimony was elicited, is objected to by the appellant, on the ground that it is broader than the evidence warrants, and embraces matters that are conclusions, rather than facts. We do not regard the objection as well taken: there is evidence tending to prove all the various elements embraced in the hypothetical question; at least, all that are of vital importance as a basis for an answer.

Appellant insists that the jury was not bound by the estimates of value, which the expert witnesses placed upon the services of appellee; and perhaps is correct in his position, that these estimates should be considered merely as matters of opinion of men of experience in such matters, whose judgment is given to the jury for the purpose of aiding them in forming their own judgment concerning the amount which should properly be allowed; and that after all a jury have a right to

Looking after the defense to be made against the charges in the bill of complaint; that he took the necessary steps, by proper investigation of the legal questions involved, and an inquiry into the facts; and ascertained and examined the various witnesses, who were supposed to have knowledge of the matters put in issue by the averments of the bill; and that he rendered valuable and successful service to his client, which finally culminated in procuring a settlement of the litigation that was quite favorable to the interests of the appellant. Appellee had received in all the sum of \$500.00 for his services prior to the commencement of this suit.

To establish the value of his services, the appellee called a number of leading practitioners of the Will County bar, who testified, that the usual and customary fee charged and paid for such services as were rendered by appellee, was from \$3000 to \$3500. The hypothetical question under which the testimony was elicited, is objected to by the appellant, on the ground that it is broader than the evidence warrants, and embraces matters that are conclusions, rather than facts. We do not regard the objection as well taken: there is evidence tending to prove all the various elements embraced in the hypothetical question; at least, all that are of vital importance as a basis for an answer.

Appellant insists that the jury was not bound by the estimates of value, which the expert witnesses placed upon the services of appellee; and perhaps is correct in his position, that these estimates should be considered merely as matters of opinion of men of experience in such matters, whose judgment is given to the jury for the purpose of aiding them in forming their own judgment concerning the amount which should properly be allowed; and that after all a jury have a right to

use their own knowledge and judgment, based upon all the evidence, as to what would be a reasonable compensation for the services. *Head v Hargrave*, 105 U. S. 45. *Forsyth v Doolittle* 130 U.S. 73. Appellant contends that error was committed because "there was no instruction in the case permitting the jurors to exercise their own judgment or discretion as to the value of such services." It is sufficient to say, with reference to this point, that inasmuch as the court was not required of its own motion, to give such an instruction, and as no instruction was requested by the appellant, concerning this matter, this question is not really before us for decision.

Appellant also insists, that it was error for the court to instruct the jury that "the plaintiff is only required to prove his case by a preponderance of the evidence, and that by a preponderance of the evidence is meant the greater weight of credible evidence, and that while as a matter of law, the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, this would be sufficient for the jury to find the issues in his favor." Appellant contends, that this instruction, while proper in ordinary cases, was misleading in this case, because of the introduction of expert testimony as to the value of the services that the jury might have inferred from the instruction, that they were bound to fix the value of the services rendered, at what the expert witnesses had fixed it, because that amount had been established by a preponderance of the evidence, when as a matter of law, they were not bound by the opinions of attorneys concerning a reasonable charge for the services, and had a right to use their own judgment and knowledge concerning the value of such services; and that the instruc-

use their own knowledge and judgment, based upon all the evidence, as to what would be a reasonable compensation for the services. Head v Hargrave, 108 U. S. 45. Forsyth v Doolittle 130 U.S. 73. Appellant contends that error was committed because "there was no instruction in the case committing the jurors to exercise their own judgment or discretion as to the value of such services." It is sufficient to say, with reference to this point, that inasmuch as the court was not required of its own motion, to give such an instruction, and as no instruction was requested by the appellant, concerning this matter, this question is not really before us for decision. Appellant also insists, that it was error for the court to instruct the jury that "the plaintiff is only required to prove his case by a preponderance of the evidence, and that by a preponderance of the evidence is meant the greater weight of credible evidence, and that while as a matter of law, the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, this would be sufficient for the jury to find the issues in his favor." Appellant contends, that this instruction, while proper in ordinary cases, was misleading in this case, because of the introduction of expert testimony as to the value of the services, that the jury might have inferred from the instruction, that they were bound to fix the value of the services rendered, at what the expert witnesses had fixed it, because that amount had been established by a preponderance of the evidence, when as a matter of law, they were not bound by the opinions of attorneys concerning a reasonable charge for the services, and had a right to use their own judgment and knowledge concerning the value of such services; and that the instruction

tions might have led the jury to believe that they had no such right.

We are unable to take this view of the matter, and the record does not justify the inference which appellant draws. In fact the record shows, that the jury's own knowledge and judgment must have entered effectively into their consideration of the matter of the amount to be allowed appellee for his services, as the verdict fixes the amount at \$500.00 less than the minimum amount fixed by appellee's witnesses; and this is especially significant, because appellant called no witnesses to contradict appellee's witnesses on this point. There was no impropriety in giving the jury an instruction concerning the preponderance of the evidence; and the instruction in question has been repeatedly approved.

While the amount of appellee's fee fixed by the jury is large, it is apparent that the benefits which accrued to appellant from appellee's services, is also large; there is nothing in the record to ~~xxxxxxx~~ indicate that the amount is excessive.

The judgment is affirmed.

Judgment affirmed.

There might have been the jury to believe that they had no such right. We are unable to take this view of the matter, and the record does not justify the inference which appellant draws. In fact, the record shows, that the jury's own knowledge and judgment must have entered effectively into their consideration of the matter of the amount to be allowed appellee for his services, as the verdict fixes the amount at \$500.00 less than the minimum amount fixed by appellee's witnesses; and this is especially significant, because appellant called no witnesses to contradict appellee's witnesses on this point.

There was no impropriety in giving the jury an instruction concerning the proportion of the evidence; and the instruction in question has been repeatedly approved.

While the amount of appellee's fee fixed by the jury is large, it is apparent that the benefits which accrued to appellee from appellee's services, is also large; there is nothing in the record to indicate that the amount is excessive.

The judgment is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. }

ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

6259

2531

AT A TERM OF THE APPELLATE COURT,

203 I.A. 523

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 12 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6259

Fred Meixner, appellant.

203 I.A. 528

vs

Appeal from Co. Ct. Peoria.

Western Live Stock Ins. Co.

appellee.

Carnes, J.

Fred Meixner, the appellant, sued the appellee insurance company in assumpsit for \$150.00 that it had received from him in part payment of his subscription of \$500.00 to its capital stock, claiming that the subscription was fraudulently obtained and that the company had agreed to cancel it and return the money. There is no controversy about the facts. At the close of the evidence each party moved for a directed verdict. The court granted the company's motion. A verdict was rendered in its favor, and ~~judgment~~ judgment entered thereon, from which this appeal is prosecuted.

It appeared that the company had employed one Davis to procure stock subscriptions and he had engaged one Hardy as sub-agent; that Hardy went to Chillicothe, Illinois, made the acquaintance of appellant, and solicited a subscription from him. After several visits and appellant's refusal to buy the stock Hardy told him that he had a little of the stock still to sell; that he had some himself and wanted some more; that he had all he could get from the company and must have somebody else take the stock; that if appellant would subscribe for twenty five shares of the stock and advance \$150.00 he, Hardy, would sell it within sixty days and pay back the \$150.00 with a profit in addition to six per cent interest. Appellant says his idea was that Hardy would sell this stock if it advanced and he would get the \$150.00 back and a little profit. June 13, 1913, appellant signed a subscription for the stock, gave Hardy \$150.00 which was remitted to

for the stock, gave Hardy \$150.00 which was retained to profit. June 13, 1913, appellant signed a subscription

it it advanced and he would get the \$150.00 back and a little

Appellant says his idea was that Hardy would sell this stock

\$150.00 with a profit in addition to six per cent interest.

he, Hardy, would sell it within sixty days and pay back the

advance for twenty five shares of the stock and advance \$150.00

have somebody else take the stock; that if appellant would

more; that he had all he could get from the company and must

stock still to sell; that he had some himself and wanted some

to buy the stock Hardy told him that he had a little of the

tion from him. After several visits and appellant's refusal

made the acquaintance of appellant, and solicited a subscrip-

as sub-agent; that Hardy went to Chillicothe, Illinois,

procure stock subscriptions and he had engaged one Hardy

It appeared that the company had employed one Davis to

this appeal is presented.

its favor, and ~~judgment~~ judgment entered thereon, from which

court granted the company's motion. A verdict was rendered in

of the evidence each party moved for a directed verdict. The

money. There is no controversy about the facts. At the close

and that the company had agreed to cancel it and return the

stock, claiming that the subscription was fraudulently obtained

in part payment of his subscription of \$500.00 to the capital

company in assumption for \$150.00 that it had received from him

Tred Melner, the appellant, and the appellee insurance

Garner, J.

appellee.

Western Live Stock Ins. Co.

vs

Appeal from Co. Ct. Peoria.

Tred Melner, appellant.

Gen. No. 6358

203 I. A. 323

appellee with the stock subscription. Appellee returned the \$100.00 to Davis as his commission on the \$500.00 stock subscription, and retained the balance of \$50.00.

Appellant heard no more from Hardy but December 6, 1913, received notice from appellee to pay the balance of his subscription. Meantime he had become suspicious of Hardy and consulted E. A. Mitchell about the transaction.

December 10, 1913 Mitchell wrote appellee saying that Meixner claimed Hardy induced him to subscribe for the stock on the ground that he would go in partnership with him and sell the stock inside of sixty days, and pay him back the \$150.00 with one half the profits on the stock, Hardy to have the other one-half for his work in selling the stock at an advance; that as the stock was sold through misrepresentations Meixner would not pay the \$350.00 and desired a return of the \$150.00 and cancellation of the stock as far as he was concerned.

The president of appellee answered saying it was impossible to cancel and return the subscription since a commission had already been paid the stock salesman on the full amount of the sale reported; that he had before received complaints of the actions of Davis' sub-agents in selling stock and was convinced that unscrupulous schemes were employed; that he would get after Davis and see if an amicable settlement could be arranged. The following April Mitchell wrote the president of appellee that Meixner wanted Hardy or the company to pay him the amount he paid, or he would take the matter into court. The president answered saying that they were anxious to get hold of Hardy and see that he make restitution to Meixner; that he was in correspondence with Davis about the matter and had told him as far as the company was concerned only a complete restitution or reimbursement of funds to the injured parties would be satis-

appeles with the stock subscription. Appelles returned the \$100.00 to Davis as his commission on the \$500.00 stock subscription, and retained the balance of \$50.00.

Appellant heard no more from Hardy but December 6, 1913, received notice from appellee to pay the balance of his subscription. Meantime he had become suspicious of Hardy and consulted E. A. Mitchell about the transaction.

December 10, 1913 Mitchell wrote appellee saying that Meixner claimed Hardy induced him to subscribe for the stock on the ground that he would go in partnership with him and sell the stock inside of sixty days, and pay him back the \$150.00 with one-half the profits on the stock, Hardy to have the other one-half for his work in selling the stock at an advance; that as the stock was sold through misrepresentations Meixner would not pay the \$350.00 and desired a return of the \$150.00 and cancellation of the stock as far as he was concerned.

The president of appellee answered saying it was impossible to cancel and return the subscription since a commission had already been paid the stock salesman on the full amount of the sale reported; that he had before received complaints of the actions of Davis, sub-agents in selling stock and was convinced that unscrupulous schemes were employed; that he would get after Davis and see if an amicable settlement could be arranged.

The following April Mitchell wrote the president of appellee that Meixner wanted Hardy or the company to pay him the amount he paid, or he would take the matter into court. The president answered saying that they were anxious to get hold of Hardy and see that he make restitution to Meixner; that he was in correspondence with Davis about the matter and had told him as far as the company was concerned only a complete restitution or reimbursement of funds to the injured parties could be satis-

factory. May 8, 1914, appellant received a call for unpaid subscriptions and Mitchell answered that Meixner and other

parties- naming them - claimed their subscriptions were obtained by fraudulent representations by an agent employed by appellee and they looked to the company to cancel the subscriptions and refund the amounts paid. The president replied that the notices sent were a matter of form and to clear their records, and said "The justice of the claims of your clients, however, is undeniable and will be adjusted to your satisfaction I assure," and quoted from a letter that he had written Davis asking him to return all the commissions paid in those matters and saying the company would return such portions of the subscriptions paid as was not paid in commissions, thus returning the full amount to each subscriber and cancel the subscription. January 2, 1915, Mitchell wrote the president that unless Meixner's claim against the company is paid in full by the fifteenth of the month he will begin suit for the amount. The president answered saying he had promised sometime ago to adjust the matters and had been delayed, but "should Mr. Meixner not be inclined to wait and if his case bears the merit I believe it to, I would suggest that he start a friendly suit against us in the county court here, and upon the production of his receipts and such other evidence as I am led to believe he possesses (and should I be correct in this surmise) we, of course, will make no defence in the matter but allow him to take judgment against us without attempt to refute such claim." February 17th. appellee's secretary wrote asking for copies of the receipts held by appellant, and other parties. March 2nd. Mitchell wrote the president acknowledging receipt of the secretary's letter of February 17th. saying "We have a request that we furnish copies of these receipts to the Chicago parties with a view to the settlement of this entire matter, and will appreciate it if you will assist

of this entire matter, and will preclude it if you will send receipts to the Chicago parties with a view to the settlement saying "we have a request that we furnish copies of these ledger receipt of the secretary's letter of February 17th, other parties. March 2nd. Mitchell wrote the president asking for copies of the receipts held by appellant, and to refute such claim." February 17th. appellee's secretary ter but allow him to take judgment against us without attempt this summae) we, of course, will make no defence in the matter led to believe he possesses (and should I be correct in the production of his receipts and such other evidence as I friendly suit against us in the county court here, and upon the merit I believe it to, I would suggest that he start a Melxner not be inclined to wait and if his case bears to adjust the matters and had been delayed, but "should Mr. The president answered saying he had promised sometime ago tenth of the month he will begin suit for the amount. Melxner's claim against the company is paid in full by the fif- January 2, 1915. Mitchell wrote the president that unless the full amount to each subscriber and cancel the subscription. and saying the company would return such portions of the subscription him to return all the commissions paid in these matters however, is undeniable and will be adjusted to your satisfaction records, and said "The justice of the claims of your clients, that the notices sent were a matter of form and to clear their tions and refund the amounts paid. The president replied appellee and they looked to the company to cancel the subscription obtained by fraudulent representations by an agent employed by parties-naming them - claimed their subscriptions were subscriptions and Mitchell answered that Melxner and other factory. May 8, 1914. appellee received a call for unpaid

us in this matter."

The above is the substance of all the correspondence shown by the record. The summons issued in this case November 10th. 1915, about eight months after the date of the last latter. Appellee's counsel, to avoid the implication that x appellant was induced to bring this suit on the suggestion that it would not be defended, say that on investigation the company concluded it was not liable and refused to pay, and so notified appellant. This does not appear in the record and does not affect the questions of law presented.

No point is made on the pleadings. The question argued here is whether under the above admitted facts the company was legally obliged to pay appellant the sum of money demanded. In our opinion it was not liable because of anything that occurred in the original subscription transaction. Appellant knew he was not dealing with the company in the matter of the proposed re-sale of this stock. He knew that he was dealing with Hardy and supposed Hardy was doing something ~~xxxxxx~~ indirectly that the company would not allow him to do directly in obtaining an interest in the stock subscribed for. Even though Hardy did not intend to keep his promise to re-sell the stock it was not such a false representation as would furnish ground for an action of fraud and deceit. It is familiar law that the fraudulent and deceitful representation relied on must be concerning an existing fact or facts to furnish a ground of action. Grubb v Milan 249 Ill. 456. There is no evidence in the record as to the value of the stock, or of Hardy's actual intention in the matter further than can be inferred from his inaction. Appellee did not cancel the stock subscription, and for anything that here appears it may be ~~that~~ a valuable investment for appellant.

Appellant argues that the correspondence above set forth should be taken as a promise by appellee to refund to

us in this matter."

The above is the substance of all the correspondence shown by the record. The summons issued in this case November

10th, 1915, about eight months after the date of the last

letter. Appellee's counsel, to avoid the implication that

appellant was induced to bring this suit on the suggestion

that it would not be defended, say that on investigation the

company concluded it was not liable and refused to pay, and

so notified appellant. This does not appear in the record and

does not affect the questions of law presented.

No point is made on the pleadings. The question argued here

is whether under the above admitted facts the company was legally

obliged to pay appellant the sum of money demanded. In our

opinion it was not liable because of anything that occurred

in the original subscription transaction. Appellant knew

he was not dealing with the company in the matter of the pro-

posed re-sale of this stock. He knew that he was dealing with

Hardy and supposed Hardy was doing something ~~xxxxxx~~ indirectly

that the company would not allow him to do directly in obtaining

an interest in the stock subscribed for. Even though Hardy

did not intend to keep his promise to re-sell the stock it

was not such a false representation as would furnish ground

for an action of fraud and deceit. It is familiar law that the

fraudulent and deceitful representation relied on must be con-

cerning an existing fact or facts to furnish a ground of action.

Grubb v. Milan 243 Ill. 458. There is no evidence in the record

as to the value of the stock, or of Hardy's actual intention

in the matter further than can be inferred from his inaction.

Appellee did not cancel the stock subscription, and for anything

that here appears it may be that a valuable investment for

appellant.

Appellant argues that the correspondence above set

forth should be taken as a promise by appellee to return to

appellant the amount of his subscription. we do not think it material to the decision of this case whether it should or not be so construed. Assuming that it was a promise by the company itself to return to appellant the amount paid by him on this subscription, there is no consideration to support that promise. There is no evidence tending to show any benefit to the promisor or damage to the promisee that would furnish a consideration for the promise. Appellee had a motive prompting it to make the promise, but the fact that there is a motive for the promise does not supply the element of consideration (9 Cyc. 330. There was no moral obligation sufficient to support the promise. It is said in 9 Cyc. 356- "It is settled as a general proposition in most jurisdictions that a promise made under a sense of moral obligation is not made upon a sufficient consideration, and is not legally binding." It appears in the notes that there is some conflict of authority, and Illinois cases are cited as not in accord with the statement in the text. The last holding of our supreme court on the subject that we find is in *Schwerdt v Schwerdt* 235 Ill. 386, 390, where the court said; -"The only moral obligation which affords consideration for a promise is one which has at sometime been a legal duty." Applying this test, there being no legal duty on appellee before the making of the promise to pay the amount demanded, there was no moral obligation sufficient to furnish a consideration for the promise.

The court did not err in directing a verdict for appellee. Therefore the judgment is affirmed.

Affirmed.

appellant the amount of his subscription. We do not think it material to the decision of this case whether it should or not be so construed. Assuming that it was a promise by the com-

pany itself to return to appellant the amount paid by him on this subscription, there is no consideration to support that

promise. There is no evidence tending to show any benefit to the promisee or damage to the promisor that would furnish a consideration for the promise. Appellee had a motive prompt-

ing it to make the promise, but the fact that there is a motive for the promise does not supply the element of consid-
eration (9 Cyc. 389). There was no moral obligation sufficient

to support the promise. It is said in 9 Cyc. 386- "It is settled as a general proposition in most jurisdictions that a promise made under a sense of moral obligation is not made upon a sufficient consideration, and is not legally binding."

It appears in the notes that there is some conflict of authority, and Illinois cases are cited as not in accord with the statement in the text. The last holding of our supreme court on the subject that we find is in *Schwartz v Schwartz* 235 Ill. 386, 390, where the court said; "The only moral obligation

which affords consideration for a promise is one which has at sometime been a legal duty." Applying this test, there being no legal duty on appellee before the making of the promise to pay the amount demanded, there was no moral obligation suf-

ficient to furnish a consideration for the promise.

The court did not err in directing a verdict for appellee.

Therefore the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

6271

2532

AT A TERM OF THE APPELLATE COURT,

203 I.A. 525

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

OCT 12 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

90,400

100,000

... and ... on ...
... and ... on ...
... and ... on ...

... and ... on ...

... and ... on ...

... and ... on ...

... and ... on ...

... and ... on ...

...

...

...

...

...

...

...

...

...

...

Gen. No. 6271.

203 I.A. 525

Vera Thompson,
Appellant,

-vs-

Appeal from Will.

The J. D. Thompson Carnation
Company, Helen T. Fish,
Charles M. Fish, Fannie T.
Quintero, P. W. Peterson,
B. Wunderlick, and Frank M.
Fairfield,
Appellees.

CARNES, J.

The J. D. Thompson Carnation Company is an Illinois corporation with a capital stock of \$58,000. and shares of the par value of \$100. each, engaged in the growth and sale of cut flowers and plants. Its capital stock is nearly all owned by the appellant, Vera Thompson, her sister, Helen T. Fish, and her husband, Charles M. Fish, the other individual parties to this suit being small stockholders. A controversy arose as to the control of the corporate affairs, which depended on the ownership of six and one-half shares of the stock that was claimed by Helen T. Fish and treated as hers by the corporate authorities.

Vera Thompson filed her bill in this case claiming to be the owner of one and one-half of said shares under an agreement that she set forth in her bill and proved, and obtained a decree in her favor as to said one and one-half shares, and no cross error is assigned as to that portion of the decree. She, by her bill, claimed the other five shares on the ground that she had purchased them from John D. Thompson, her brother, in the lifetime of her father, John M. Thompson. Her sister, Helen T. Fish, claimed these five shares under a contract of August

2031.A. 225

Vers Thompson,
Appellant,

Appeal from Will.

-vs-

The J. D. Thompson Carnation
Company, Helen T. Fish,
Charles M. Fish, Fannie T.
Quintero, P. W. Peterson,
B. Wunderrick, and Frank M.
Fairfield,
Appellees.

CARNES, J.

The J. D. Thompson Carnation Company is an Illinois corporation with a capital stock of \$28,000, and shares of the par value of \$100. each, engaged in the growth and sale of cut flowers and plants. Its capital stock is nearly all owned by the appellant, Vers Thompson, her sister, Helen T. Fish, and her husband, Charles M. Fish, the other individual parties to this suit being small stockholders. A controversy arose as to the control of the corporate affairs, which depended on the ownership of six and one-half shares of the stock that was claimed by Helen T. Fish and treated as hers by the corporate authorities. Vers Thompson filed her bill in this case claiming to be the owner of one and one-half of said shares under an agreement that she set forth in her bill and proved, and obtained a decree in her favor as to said one and one-half shares, and no cross error is assigned as to that portion of the decree. She, by her bill, claimed the other five shares on the ground that she had purchased them from John D. Thompson, her brother, in the lifetime of her father, John M. Thompson. Her sister, Helen T. Fish, claimed these five shares under a contract of August

10, 1908, hereinafter set forth, between herself and her father. The chancellor found, as a matter of fact, that the father, John M. Thompson, owned the five shares at the time of making the contract with Helen T. Fish, and that the ownership of the stock depended upon the construction of the contract. Appellant acquiesces in the finding that the father, John M. Thompson, owned the five shares of stock at the date of the contract and rests her case here entirely on the question of the validity and effect of that contract, claiming that it is void as against public policy, and also as an attempted testamentary disposition of property. The chancellor found the contract valid and enforceable; that it "was not a testamentary disposition of property"; that "the legal and equitable right and title in and to said five shares of stock were intended to be vested and ought to be vested in the said Helen T. Fish at the death of John M. Thompson," and by his decree confirmed the title of Helen T. Fish to said five shares subject to the provisions in favor of Vera Thompson as to dividends and payment of money to her by Helen T. Fish found in the third and seventh clauses of said contract. If the contract is void for either of the two reasons suggested by appellant the decree is erroneous. If it is not open to either of those two objections there is no error in the decree.

The contract reads as follows:- "We, the undersigned, J. M. Thompson, being the owner this date of five shares of stock in the J.D. Thompson Carnation Company, Helen T. Fish being the owner of two hundred and eleven (211) shares of stock of the J.D. Thompson Carnation Company, and Chas. M. Fish being the owner of seventy-six (76) shares of stock of the

10, 1903, hereinafter set forth, between herself and her father. The chancellor found, as a matter of fact, that the father, John M. Thompson, owned the five shares at the time of making the contract with Helen T. Fish, and that the ownership of the stock depended upon the construction of the contract. Appellant agrees in the finding that the father, John M. Thompson, owned the five shares of stock at the date of the contract and rests her case here entirely on the question of the validity and effect of that contract, claiming that it is void as against public policy, and also as an attempted testamentary disposition of property. The chancellor found the contract valid and enforceable; that it "was not a testamentary disposition of property"; that "the legal and equitable right and title in and to said five shares of stock were intended to be vested and ought to be vested in the said Helen T. Fish at the death of John M. Thompson," and by his decree confirmed the title of Helen T. Fish to said five shares subject to the provisions in favor of Vera Thompson as to dividends and payment of money to her by Helen T. Fish found in the third and seventh clauses of said contract. If the contract is void for either of the two reasons suggested by appellant the decree is erroneous. If it is not void for either of those two objections there is no error in the decree.

The contract reads as follows: "We, the undersigned, J. M. Thompson, being the owner of five shares of stock in the J. M. Thompson Corporation, Helen T. Fish, being the owner of two hundred and eleven (111) shares of stock of the J. M. Thompson Corporation, and Charles T. Fish, being the owner of seventy-six (76) shares of stock of the

J. D. Thompson Carnation Company, all of said parties of the City of Joliet, County of Will and State of Illinois, agree together as follows:-

1st. That we each and every one shall vote our respective shares of stock in the above mentioned Company at all regular, special or adjourned meetings of stockholders of said Company for each other for directors of said Company, and for no other person or persons.

2nd. That we, for the best interests of the company desire to have the following named persons elected as officers of the said above mentioned Carnation Company; J. M. Thompson for President, Helen T. Fish for Vice-President, Vera Thompson for Treasurer, and Chas. M. Fish for Secretary and General Manager.

3rd. That in case of the death of J. M. Thompson, Helen T. Fish shall have the voting of the five shares of stock standing in the name of J. M. Thompson, and that the dividends on the above five shares shall be paid to Vera Thompson.

4th. That in case of the absence of J. M. Thompson, from any meeting of stockholders of the above mentioned company, Helen T. Fish shall vote the five shares of stock standing in the name of J. M. Thompson on books of said company.

5th. That we shall not buy or sell any shares of stock of the above mentioned company without the written consent of the undersigned parties.

6th. That in case of the death of J. M. Thompson, Vera Thompson may become a party to this agreement by signing same.

7th. That in the case of the death of J. M. Thompson, Helen T. Fish shall pay to J. D. Thompson one-third (1/3) of the

1. D. Thompson Garnation Company, all of said parties of the
 City of Joliet, County of Will and State of Illinois, agree
 together as follows:-
 1st. That we each and every one shall vote our respective
 shares of stock in the above mentioned Company at all regular,
 special or adjourned meetings of stockholders of said Company
 for each other for directors of said Company, and for no other
 person or persons.
 2nd. That we, for the best interests of the company desire
 to have the following named persons elected as officers of
 the said above mentioned Garnation Company; J. M. Thompson
 for President, Helen T. Fish for Vice-President, Vera Thompson
 for Treasurer, and Chas. M. Fish for Secretary and General
 Manager.
 3rd. That in case of the death of J. M. Thompson, Helen T.
 Fish shall have the voting of the five shares of stock standing
 in the name of J. M. Thompson, and that the dividends on the
 above five shares shall be paid to Vera Thompson.
 4th. That in case of the absence of J. M. Thompson, from
 any meeting of stockholders of the above mentioned company,
 Helen T. Fish shall vote the five shares of stock standing in
 the name of J. M. Thompson on books of said company.
 5th. That we shall not buy or sell any shares of stock
 of the above mentioned company without the written consent of
 the undersigned parties.
 6th. That in case of the death of J. M. Thompson, Vera
 Thompson may become a party to this agreement by signing same.
 7th. That in the case of the death of J. M. Thompson, Helen
 T. Fish shall pay to J. D. Thompson one-third (1/3) of the

par value of said above mentioned five shares of stock belonging to J.M.Thompson, said par value being (\$166.66) One hundred sixty-six and sixty-six one hundredths dollars, and also to Vera Thompson the same amount.

8th. That this agreement can be changed or terminated only by the unanimous written consent of the undersigned parties.

9th. That this agreement shall be binding upon the heirs, executors, administrators and assignes of the undersigned parties.

This agreement is made in duplicate.

Witness our hands and seals this tenth day of November, 1911.

J.M.Thompson,	(Seal)
Helen T.Fish,	(Seal)
Charles M.Fish,	(Seal) "

John M. Thompson died intestate January 15, 1912, leaving as his only heirs-at-law his children, Vera Thompson, Helen T. Fish, and John D.Thompson. There had been no administration on his estate.

Appellant argues that the contract should be held void as against public policy on the ground that it provides for perpetual control of the five shares of stock by Helen T.Fish while she was not the owner, and lays stress on clause nine providing that the agreement shall be binding upon the heirs, executors, etc. If the chancellor's conclusion that the contract provided for the ownership of the stock by Helen T.Fish on the death of her father is right, this objection is without force. Appellant cites Luthy v Ream, 270 Ill. 170, 180, in support of her contention.

is right, this objection is without force. Plaintiff cites

ownership of the stock by Helen T. Wish on the death of her father

If the chancellor's conclusion that the contract provided for the

the agreement shall be binding upon the heirs, executors, etc.

was not the owner, and lays stress on clause nine providing that

control of the five shares of stock by Helen T. Wish while she

against public policy on the ground that it provides for perpetual

Appellant argues that the contract should be held void as

his estate.

Wish, and John D. Thompson. There had been no administration on

as his only heirs-at-law his children, Vera Thompson, Helen T.

John M. Thompson died intestate January 15, 1912, leaving

Charles W. Wish, (Seal) "

Helen T. Wish, (Seal)

J. M. Thompson, (Seal)

1911.

Witness our hands and seals this tenth day of November,

This agreement is made in duplicates.

Parties.

executors, administrators and assigns of the undersigned

9th. That this agreement shall be binding upon the heirs,

Parties.

only by the unanimous written consent of the undersigned

8th. That this agreement can be changed or terminated

and also to Vera Thompson the same amount.

One hundred sixty-six and sixty-six one hundredths dollars,

longing to J. M. Thompson, said per value being (\$166.66)

per value of said above mentioned five shares of stock be-

It is there said that " an agreement, the purpose and effect of which are to permit the affairs of the corporation to be managed by the determination of persons other than its stockholders, or by a minority of its own stockholders, is invalid", citing many authorities. The contract in the present case does not violate the rule there announced. John M. Thompson retained the control of his stock during his lifetime. Mrs. Fish had no absolute control of it until his death, when, under the chancellor's construction of the contract, she became the owner. We conclude the contract is not open to ^{the} objection that it is against public policy. (Venner v Chicago City Ry. Co., 258 Ill. 523)

Appellant argues that the two above quoted findings of the chancellor that the ownership of the stock vested in Helen T. Fish on the death of her father, and that it was not a testamentary disposition of the property, are utterly inconsistent, and seems to contend that any contract by the owner of personal property to control it during his lifetime and vest it in another on his death amounts to a testamentary disposition of the property, and is therefore void ~~in~~ if not executed as a will, and cites Olney v Howe, 89 Ill. 556; Comer v Comer, 120 Ill. 420, and Oswald v Caldwell, 225 Ill. 224 in support of her contention. Neither of these cases deny the right of the owner of property to make a valid contract with another, supported by a sufficient consideration, to take effect on the death of the owner. It is true the contract must be binding at and after the time of its execution and not one that the obligor can change at pleasure as he could his will. And it must not be a mere gift

It is there said that "an agreement, the purpose and effect of which are to permit the affairs of the corporation to be managed by the determination of persons other than its stockholders, or by a minority of its own stockholders, is invalid," citing many authorities. The contract in the present case does not violate the rule there announced. John M. Thompson retained the control of his stock during his lifetime. Fish had no absolute control of it until his death, when, under the chancellor's construction of the contract, she became the owner. We conclude the contract is not open to objection that it is against public policy. (Vannoy v. Chicago City Co., 358 Ill. 527)

Appellant argues that the two above quoted findings of the chancellor that the ownership of the stock vested in Helen T. Fish on the death of her father, and that it was not a testamentary disposition of the property, are utterly inconsistent, and seems to contend that any contract by the owner of personal property to control it during his lifetime and vest it in another on his death amounts to a testamentary disposition of the property, and is therefore void ~~in~~ it not executed as a will, and cites Olney v. Howe, 39 Ill. 526; Corcoran v. Corcoran, 120 Ill. 430, and Oswald v. Caldwell, 325 Ill. 524 in support of her contention. Neither of these cases deny the right of the owner of property to make a valid contract with another, supported by a sufficient consideration, to take effect on the death of the owner. It is true the contract must be binding at and after the time of its execution and not one that the obligor can change at pleasure as he could his will. And it must not be a mere gift

as distinguished from a contract. In *Olney v Howe*, supra, the court pointed out clearly that the agreement, considered as a contract, was void for want of mutuality; therefore it was considered as an attempted testamentary disposition of property.

The clauses in the contract on which Helen T. Fish must rely for her title to the five shares of stock on the death of J. M. Thompson are the third, providing that she shall have the voting power, and the seventh that she shall pay one-third of the par value to her brother, and one-third to her sister. It is also provided in the third that dividends shall be paid to the sister. Property, strictly speaking, is "That dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects." (32 Cyc. 648)

Helen T. Fish by this agreement acquired the sole right of dominion over the five shares of stock upon the death of her father; she therefore acquired the property or ownership of the stock. The contract cannot be said to vest only a future interest in her. It gave her a present interest in the five shares of stock that they should be voted the same as her stock. If there had been nothing in the agreement other than the provision vesting this property in her at her father's death, it would have been an attempted testamentary disposition of property and void for that reason. But there was also the provision in clause one that the parties should vote their stock for each other for directors, which may be presumed to have been deemed a benefit to each of the parties to the contract. There was also in clause two what amounts to an agreement that J.M. Thompson should be elected

as distinguished from a contract. In *Olmey v Howe*, supra, the court pointed out clearly that the agreement, considered as a contract, was void for want of mutuality; therefore it was considered as an attempted testamentary disposition of property.

The clauses in the contract on which Helen T. Fish was relying

for her title to the five shares of stock on the death of J. M. Thompson and the third, providing that she shall have the voting power, and the seventh that she shall pay one-third of the per value to her brother, and one-third to her sister. It is also provided in the third that dividends shall be paid to the sister. Property, strictly speaking, is "that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects." (32 Cyc. 648) Helen T. Fish by this agreement acquired the sole right of disposition over the five shares of stock upon the death of her father; she therefore acquired the property or ownership of the stock. The contract cannot be said to vest only a future interest in her. It gave her a present interest in the five shares of stock that they should be voted the same as her stock. If there had been nothing in the agreement other than the provision vesting the property in her at her father's death, it would have been an attempted testamentary disposition of property and void for that reason. But there was also the provision in clause one that the parties should vote their stock for each other for directors, which may be presumed to have been deemed a benefit to each of the parties to the contract. There was also in clause two what amounts to an agreement that J. M. Thompson should be elected

president of the corporation. This was a benefit moving to him, and especially so as his small holding of the capital stock did not give him much power in controlling the offices and affairs of the company. We conclude the writing in question is, in legal effect, a valid and irrevocable contract based on a sufficient consideration, as distinguished from an attempt to make a testamentary disposition; therefore the court did not err in its decree in that regard. The decree is affirmed.

Affirmed.

Dibell, J. took no part.

president of the corporation. This was a beneficial move to
him, and especially so as his small holding of the capital stock
did not give him much power in controlling the offices and affairs
of the company. He concludes the writing in question is, in
legal effect, a valid and irrevocable contract based on a tentative
consideration, as distinguished from an attempt to make a tentative
disposition; therefore the court did not err in its
decree in that regard. The decree is affirmed.

Affirmed.

Dibell, J., took no part.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

203-617

6084

2576

AT A TERM OF THE APPELLATE COURT,

203 I.A. 617

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

203 I.A. 617

BE IT REMEMBERED, that afterwards, to-wit: on

NOV 9 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Page 6

Gen. No. 6084.

203 I.A. 617

Agenda 64.

Joseph Comorowski, by Miks Comorowski,
his father and next friend,

Appellee,

-vs-

Appeal from
Bureau County.

Spring Valley Coal Company,

Appellant.

NIEHAUS, P. J.

In this case the appellee, Joseph Comorowski, by Miks Comorowski, his next friend, sued the appellant, Spring Valley Coal Company, in an action on the case in the circuit court of Bureau County, to recover damages for personal injuries sustained by appellee while employed in appellant's coal mine. There was a trial by jury, and the jury returned a verdict against appellant, finding damages to the amount of \$1600. The court rendered judgment on the verdict, and from this judgment an appeal was taken to this court.

The proof shows that the appellee was a mule driver employed in appellant's coal mine number 5, which was operated at Dalzell, Illinois, by a system called the long wall system. Under this system various entries are driven from the main shaft in various directions; and along some of the entries tracks are laid on which coal cars are drawn by mules, and by the means of these cars the coal is transported from the place where it is mined to the main shaft to be hoisted. The appellee was injured in one of such entries in appellant's mine, which is denominated as first left off of the second left, off of the southwest entry; and it is situated in the western part of the mine. At the time of his injury appellee was

203 I.A. 617

Joseph Comorowski, by Mike Comorowski,
his father and next friend,

Appellee,

-vs-

Spring Valley Coal Company,

Appellant.

Appeal from
Bureau County.

WITNESSES, P. 1.

In this case the appellee, Joseph Comorowski, by Mike Comorowski, his next friend, and the appellant, Spring Valley Coal Company, in an action on the case in the circuit court of Bureau County, to recover damages for personal injuries sustained by appellee while employed in appellant's coal mine. There was a trial by jury, and the jury returned a verdict against appellant, finding damages to the amount of \$1600. The court rendered judgment on the verdict, and from this judgment an appeal was taken to this court.

The proof shows that the appellee was a mule driver employed in appellant's coal mine number 6, which was operated at Daleville, Illinois, by a system called the long wall system. Under this system various entries are driven from the main shaft in various directions; and along some of the entries tracks are laid on which coal cars are drawn by mules, and by the cars of these cars the coal is transported from the place where it is mined to the main shaft. The appellee was injured in one of such entries in appellant's mine, which is denominated as first left off of the second left, off of the southwest entry; and it is situated in the western part of the mine. At the time of his injury appellee was

driving a mule, which was hitched to a loaded car, by loose chains which were attached to the front. It is claimed by appellee that while he was thus engaged in driving the mule, which was drawing the loaded car through the entry-way in question, to the main shaft, and sitting on the left side at the regular place of the driver of such a car, that the mule became obstreperous and was in the act of backing against him, so that his body was apparently in danger of being violently pushed by the mule, against the car, which was moving down the hill at the place in question; and that to avoid being crushed he jumped off to the left side and in doing so stepped on a rock, which caused him to slip and fall in front of the moving car, which then ran over his limb and broke it.

The declaration upon which recovery is based and upon which the case went to the jury, consists of four counts, three of which are based upon the statute, and one count charges common law negligence. It is charged in the declaration that the appellant had rejected the Workmen's Compensation Act, which went into force July 1, 1913; that the space on each side of the track along the entry-way in question between the rail and the wall, which was very narrow, was filled with rubbish, material, debris, pieces of rock, soap stone, fallen coal, waste wood and timbers; that in consequence there was not room enough for a person to stand or walk in order to get out of the way of the passing coal car; that it was the duty of the appellant to clear one side of this road or entry-way of refuse and materials, and that it had wrongfully and wilfully failed so to do.

The declaration also charges that it was the duty of the appellant to prove for the appellee a reasonably safe place in which to work, and reasonably safe conditions ^{der} un/which to perform his work, and that it had wrongfully, negligently and unlawfully failed

driving a mule, which was hitched to a loaded car, by loose chains which were attached to the front. It is claimed by appellee that while he was thus engaged in driving the mule, which was drawing the loaded car through the entry-way in question, to the main shaft, and sitting on the left side at the regular place of the driver of such a car, that the mule became obstreperous and was in the act of backing against him, so that his body was apparently in danger of being violently pushed by the mule, against the car, which was moving down the hill at the place in question; and that to avoid being crushed, he jumped off to the left side and, in doing so stepped on a rock, which caused him to slip and fall in front of the moving car, which then ran over his limb and broke it.

The declaration upon which recovery is based and upon which the case went to the jury, consists of four counts, three of which are based upon the statute, and one count charges common law negligence. It is charged in the declaration that the appellant had rejected the Workmen's Compensation Act, which went into force July 1, 1913; that the space on each side of the track along the entry-way in question between the rail and the wall, which was very narrow, was filled with rubbish, material, debris, pieces of rock, soap stone, fallen coal, waste wood and timbers; that in consequence there was not room enough for a person to stand or walk in order to get out of the way of the passing coal cars; that it was the duty of the appellant to clear one side of this road or entry-way of refuse and materials, and that it had wrongfully and wilfully failed so to do.

The declaration also charges that it was the duty of the appellant to prove for the appellee a reasonably safe place in which to work, and reasonably safe conditions, ^{for} which to perform the work, and that it had wrongfully, negligently and unlawfully failed

so to do; but wilfully permitted appellee to work under unsafe conditions, without warning, and by allowing this entry-way to be in a defective, obstructed and unsafe condition; that the presence of this obstruction and debris caused him to be thrown in front of the moving car, when it became necessary for his safety to jump off the loaded car, by means whereof he was injured.

It is also charged that the mine examiner wilfully failed to examine this entry-way, in which the appellee was injured, within eight hours preceding the time that operations commenced in the mine on the day of the injury; and that he wilfully failed to observe whether there were any dangerous conditions, and wilfully failed to inscribe on the walls of this entry-way, or at any place along in the vicinity, the month and day of the month of his visit; and wilfully failed to place a conspicuous mark or sign at the place of such dangerous conditions as a notice to all workmen to keep put; and that he wilfully failed, on completing his examination for the day in question, to make a daily record as required by law to be made in a book kept for that purpose of the dangerous conditions of this entry-way and place; and that by reason thereof, while the appellee was driving a trip on the car at the place in question when it having become necessary for him to get off of the moving car and trip, to a place at the left side of the road, the appellee came in contact with said defective and dangerous condition in getting off and was thereby thrown in front of the moving car and injured.

Appellant insists that an improper and prejudicial question was asked of one of the jurors on his voir dire. The question asked was: " In case the jury in this case agree and conclude that the defendant is guilty, and that the plaintiff is entitled to damages, would you be willing in your verdict, would you give him all the damages he is entitled to under the law and the evidence

as to do; but willfully permitted appellee to work under unsafe conditions, without warning, and by allowing this entry-way to be in a defective, obstructed and unsafe condition; that the presence of this obstruction and debris caused him to be thrown in front of the moving car, when it became necessary for his safety to jump off the loaded car, by means whereof he was injured.

It is also charged that the mine examiner willfully failed to examine this entry-way, in which the appellee was injured, within eight hours preceding the time that operations commenced in the mine on the day of the injury; and that he willfully failed to observe whether there were any dangerous conditions, and willfully failed to inscribe on the walls of this entry-way, or at any place along in the vicinity, the month and day of the month of his visit; and willfully failed to place a conspicuous mark or sign at the place of each dangerous condition as a notice to all workmen to keep out; and that he willfully failed, on completing his examination for the day in question, to make a daily record as required by law to be made in a book kept for that purpose of the dangerous conditions of this entry-way and place; and that by reason thereof, while the appellee was driving a trip on the car at the place in question when it having become necessary for him to get off of the moving car and trip, to a place at the left side of the road, the appellee came in contact with said defective and dangerous condition in getting off and was thereby thrown in front of the moving car and injured.

Appellant insists that an improper and prejudicial question was asked of one of the jurors on his voir dire. The question asked was: "In case the jury in this case agree and conclude that the defendant is guilty, and that the plaintiff is entitled to damages, would you be willing in your verdict, would you give him all the damages he is entitled to under the law and the evidence

in this case?" And the answer of the juror was: " I would go according to my own judgment in the matter on the evidence and the law; I do not know what amount he is suing for." The question was undoubtedly asked with reference to the possible exercise of a peremptory challenge, and we are of opinion that in that view it was competent and allowable. The answer of the juror showed him to be a competent juror to sit in the case. If the juror was not satisfactory to the appellant it had the right to challenge him peremptorily. Nothing appears in the record which indicates that appellant could not have done so if it had desired.

Appellant contends that the evidence does not support the verdict. But the record does not sustain its contention in that regard. It is only necessary to refer to the evidence concerning one of the charges laid in the declaration.

The statute requires that at least one side of haulage roads in coal mines shall be kept clear of refuse, and that the refuse shall not be permitted to be within two and one-half feet of the rails. It is true that three witnesses for appellant, - namely, the mine manager, the mine examiner and the driver boss, testified positively that the right side of the haulage road in question was clear of refuse and rocks. Another witness for appellant, John Vigna, testified that there were some little rocks on the right hand side, but further back from the place where appellee was injured. I, Paspychalli, appellant's surveyor, who made the plat of the haulage road in question, stated simply that there were no obstructions on the right hand side, but that on the left hand side where appellee was injured where the space between the rail and the rib was 1- $\frac{1}{2}$ feet, there were small rocks between the rail and the rib about as large as a fist. The appellee testified that there was refuse in the form of loose rocks along and at the rails on both sides of the haulage road, at the place where howass injured;

in this case?" And the answer of the juror was: "I would go according to my own judgment in the matter on the evidence and the law; I do not know what amount he is asking for." The question was

undoubtedly asked with reference to the possible exercise of a peremptory challenge, and we are of opinion that in that view it was competent and allowable. The answer of the juror showed him to be a competent juror to sit in the case. If the juror was not satisfactory to the appellant it had the right to challenge him peremptorily. Nothing appears in the record which indicates that appellant could not have done so if it had desired.

Appellant contends that the evidence does not support the verdict. But the record does not sustain its contention in that regard. It is only necessary to refer to the evidence concerning one of the charges laid in the declaration.

The statute requires that at least one side of haulage roads in coal mines shall be kept clear of refuse, and that the refuse shall not be permitted to be within two and one-half feet of the rails. It is true that three witnesses for appellant, namely, the mine manager, the mine examiner and the driver boss, testified positively that the right side of the haulage road in question was clear of refuse and rocks. Another witness for appellant, John Vigna, testified that there were some little rocks on the right hand side, but further back from the place where appellee was injured. I, Paspychnall, appellant's surveyor, who made the plat of the haulage road in question, stated simply that there were no obstructions on the right hand side, but that on the left hand side where appellee was injured where the space between the rails and the rib was 1-1/2 feet, there were small rocks between the rails and the rib about as large as a fist. The appellee testified that there was refuse in the form of loose rocks along and at the rails on both sides of the haulage road, at the place where he was injured;

and that he slipped on one of these loose rocks and that it caused him to fall in front of the car. He is corroborated expressly by four witnesses, as to the refuse on both sides of the road along the rails, and by six witnesses as to the condition on the left hand side, where he was injured. It is apparent, therefore, that the preponderance of the evidence shows that this refuse was allowed to accumulate on both sides of the haulage road in violation of the statute, and as charged in the declaration. While it is true that appellant was only required to keep one side clear of refuse, yet when neither side is kept clear it cannot justly be heard to say that it never intended to keep clear the side on which the appellee was injured; and that therefore the violation of the statute had nothing to do with the injury to appellee.

The appellant also contends that the court erred in refusing to permit certain interrogatories, which were put to so-called expert witnesses, for the purpose of eliciting the opinions of the witnesses upon the question whether or not the conditions in the mine, and at the place of the injury, were safe conditions, considering appellee's work. The conditions referred to were actual conditions in the mine, and whether they were safe or not was a matter of common observation and witnesses were examined in the case with reference to such actual conditions. Under these circumstances the opinions of so-called expert witnesses are not competent. (Crooks v Tazewell County Coal Company, 263 Ill. 343; Keith v Armour & Co., 258 Ill. 28)

The record does not disclose any substantial error in the rulings of the court in regard to the admission or rejection of evidence.

Concerning errors assigned in reference to the instructions we are of opinion that there was no error in giving to the jury the

and that he slipped on one of these loose rocks and that it caused him to fall in front of the car. He is corroborated expressly by four witnesses, as to the refuse on both sides of the road along the rails, and by six witnesses as to the condition on the left hand side, where he was injured. It is apparent, therefore, that the preponderance of the evidence shows that this refuse was allowed to accumulate on both sides of the haulage road in violation of the statute, and as charged in the declaration. While it is true that appellant was only required to keep one side clear of refuse, yet when neither side is kept clear it cannot justly be held to say that it never intended to keep clear the side on which the appellee was injured; and that therefore the violation of the statute had nothing to do with the injury to appellee.

The appellant also contends that the court erred in refusing to permit certain interrogatories, which were put to so-called expert witnesses, for the purpose of eliciting the opinions of the witnesses upon the question whether or not the conditions in the mine, and at the place of the injury, were safe conditions, considering appellee's work. The conditions referred to were actual conditions in the mine, and whether they were safe or not was a matter of common observation and witnesses were examined in the case with reference to such actual conditions. Under these circumstances the opinions of so-called expert witnesses are not competent. (Crooks v. Tazewell County Coal Company, 283 Ill. 242; Keith v. Armour & Co., 283 Ill. 28)

The record does not disclose any substantial error in the rulings of the court in regard to the admission or rejection of evidence. Concerning errors assigned in reference to the instructions we are of opinion that there was no error in giving to the jury the

instruction relating to the effect of a slight preponderance of the evidence. The instruction has been repeatedly approved by the courts of review in this state. Nor was there error in giving the 5th of appellee's instructions, because it applied only to the second count of the declaration, and it was not necessary to specially direct the jury's attention to this fact. The 6th, 7th, 8th, 9th and 10th instructions for the appellee set out particular provisions of the statute, the violation of which is charged in the declaration, and told the jury that if the appellant wilfully failed to comply with these provisions, and such wilful violation caused the injuries to appellee, that they should find the appellant guilty. While we do not approve of instructions of this character, it is not error to give them. (Donk Bros. Coal & Coke Co. v Peton, 192 Ill. 41; Mt. Olive & Streator Coal Co., v Rademasher, 190 Ill. 538) And the instructions are not subject to the objection made, that they assume something against the appellant.

Appellant also complains of the court's refusal to give certain instructions for the appellant, among which is the 48th instruction. This is a cautionary instruction, and inasmuch as it told the jury that each juror must exercise his individual judgment and conscience, the instruction had a tendency to induce some of the jurors to neglect to confer and consider the arguments of co-jurors, in discussing and considering the case, and thereby lead to a disagreement; and there was therefore no error committed in refusing it, especially since another cautionary instruction requested by appellant had been given. Instructions of this character have been disapproved by our supreme court. (City of Evanston v. Richards, 224 Ill. 244.)

Some of the refused instructions contained matters of law, concerning which appellant was entitled to have the jury instructed; but these matters were sufficiently set out in other instructions which the court gave, and it therefore was not error to refuse to

instruction relating to the effect of a slight preponderance of the evidence. The instruction has been repeatedly approved by the courts of review in this state. Nor was there error in giving the 8th of appellee's instructions, because it applied only to the second count of the declaration, and it was not necessary to specially direct the jury's attention to this fact. The 6th, 7th, 8th, 9th and 10th instructions for the appellee set out particular provisions of the statute, the violation of which is charged in the declaration, and told the jury that if the appellant willfully failed to comply with these provisions, and such willful violation caused the injuries to appellee, that they should find the appellant guilty. While we do not approve of instructions of this character, it is not error to give them. (Donk Bros. Coal & Coke Co. v. Paton, 122 Ill. 41; Et. Olive & Streater Coal Co., v. Rademacher, 120 Ill. 528; and the instructions are not subject to the objection made, that they contain something against the appellant.

Appellant also complains of the court's refusal to give certain instructions for the appellant, among which is the 48th instruction. This is a cautionary instruction, and inasmuch as it told the jury that each juror must exercise his individual judgment and conscience, the instruction had a tendency to induce some of the jurors to neglect to confer and consider the arguments of co-defendants, in discussing and considering the case, and thereby lead to a disagreement; and there was therefore no error committed in refusing it, especially since another cautionary instruction requested by appellant had been given. Instructions of this character have been disapproved by our supreme court. (City of Evanston v. Richards, 224 Ill. 244.)

Some of the refused instructions contained matters of law concerning which appellant was entitled to have the jury instructed; but these matters were sufficiently set out in other instructions which the court gave, and it therefore was not error to refuse to

give them. (Hess Co. v. Davidson, 149 Ill. 145)

By the 49th instruction, which was refused, the court was asked to tell the jury that it was not intimating that a dangerous condition existed in the mine in question. The court had not given any instruction which assumed that dangerous conditions existed; and while the giving of this instruction was permissible, the court was not bound to give it under the circumstances. The appellant could, with greater propriety, have asked to have the jury instructed that the court did not intimate any opinion on any controverted question of fact, rather than single out some one question in dispute and have the jury told that the court was not passing judgment on that question, or expressing any opinion regarding it.

Instructions numbers 50, 51, 53, 55 and 56 sought to get before the jury the idea that if the mine examiner did not consider the condition that existed dangerous, then that appellee could not recover. This is not the law, and these instructions were properly refused. (Aetitus v. S.V.Coal Co., 150 Ill. App. 491, and 246 Ill. 32) And in Lolli v.S.V.Coal Co. this court held in an opinion filed March 9, 1915, " that whether or not the mine manager considers the condition in a mine dangerous, is not the criterion upon which to base the right of recovery. The conditions which it is claimed existed in this case were visible, and matters of common observation, to any mine examiner in passing by them, and the company should not be relieved from liability by the opinion of the mine examiner that it was not a dangerous condition, if the jury finds ~~that it was not~~ as a matter of fact from the evidence, that the condition was dangerous.

Instruction number 52 is a cautionary instruction, and while it would not have been error to have given this instruction, it also

give them. (Hess Co. v. Davidson, 149 Ill. 148)

By the 49th instruction, which was refused, the court was asked to tell the jury that it was not insisting that a dangerous condition existed in the mine in question. The court had not given any instruction which assumed that dangerous conditions existed; and while the giving of this instruction was permissible, the court was not bound to give it under the circumstances. The appellant could, with greater propriety, have asked to have the jury instructed that the court did not intimate any opinion on any controverted question of fact, rather than single out some one question in dispute and have the jury told that the court was not passing judgment on that question, or expressing any opinion regarding it.

Instructions numbers 50, 51, 52, 55 and 56 sought to put before the jury the idea that if the mine examiner did not consider the condition that existed dangerous, then that appellee could not recover. This is not the law, and these instructions were properly refused. (Aetna v. S.V. Coal Co., 150 Ill. App. 491, and 248 Ill. 32) And in Hollis v. S.V. Coal Co. this court held in an opinion filed March 9, 1915, "that whether or not the mine manager considered the condition in a mine dangerous, is not the criterion upon which to base the right of recovery. The conditions which it is claimed existed in this case were visible, and matters of common observation, to any mine examiner in passing by them, and the company should not be relieved from liability by the opinion of the mine examiner that it was not a dangerous condition, if the jury finds that it was not as a matter of fact from the evidence, that the condition was dangerous."

Instruction number 52 is a cautionary instruction, and while it would not have been error to have given this instruction, it does

is not error to refuse instructions of this character. Instruction number 57 aimed to tell the jury what was not the law in reference to a matter not material to the questions in controversy, and was therefore properly refused.

We are of opinion that there is no reversible error in this case, and the judgment should therefore be affirmed.

Affirmed.

is not error to refuse instructions of this character. Instruction number 27 aimed to tell the jury what was not the law in reference to a matter not material to the questions in controversy, and was therefore properly refused.

We are of opinion that there is no reversible error in this case, and the judgment should therefore be affirmed.

Affirmed.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

62417 6242
2075
AT A TERM OF THE APPELLATE COURT,

2031.A. 628

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

NOV 9 1916

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. Nos. 6241, 6242.

Ag. No. 83.

203 I.A. 628

Leslie P. Voorhees,
Defendant in Error,

-vs-

Error to Will.

Hannah E. Mason, Executrix,
etc., et al,
Plaintiffs in Error.

CARNES, J.

Leslie P. Voorhees, the defendant in error, owned five shares of the capital stock and five income certificates of the Joliet Tropical Plantation Company, and as such stockholder filed his bill in equity May 21, 1906, for an accounting of the corporation by six of its seven directors for the full value of certain of its stock and income certificates, which it was alleged they had wrongfully issued to themselves individually on payment to the corporation of one half the value thereof, and for dividends they had drawn thereon, and also for an accounting as to certain commissions they were charged with wrongfully taking on sales made by them of other stock and certificates of the corporation. The bill was filed in behalf of the complainant and such other stockholders as might choose to join therein, but no other stockholder did so join.

The corporation was organized under the laws of Delaware July, 1902, with an authorized capital stock of \$150,000. divided into 15,000 shares, with a par value of \$10. each. Its principal business was the acquiring of lands in Mexico, and cultivating coffee, rubber, and other agricultural products. 1264 shares of the capital stock had been issued. The actual business of the company was transacted at Joliet, where the six defendant directors lived.

was transacted at Joliet, where the six defendant directors lived. Capital stock had been issued. The actual business of the company, rubber, and other agricultural products. 1864 shares of the business was the acquiring of lands in Mexico, and cultivating coffee into 12,000 shares, with a par value of 10. each. Its principal July, 1902, with an authorized capital stock of \$150,000. divided The corporation was organized under the laws of Delaware

join therein, but no other stockholder did so join. of the complaint and such other stockholders as might choose to and certificates of the corporation. The bill was filed in behalf charged with wrongfully taking on sales made by them of other stock on, and also for an accounting as to certain commissions they were of one half the value thereof, and for dividends they had drawn there- fully issued to themselves individually on payment to the corporation stock and income certificates, which it was alleged they had wrong- by six of its seven directors for the full value of certain of its his bill in equity May 21, 1906, for an accounting of the corporation Joliet Tropical Plantation Company, and as such stockholder filed shares of the capital stock and five income certificates of the Leslie P. Voorhees, the defendant in error, owned five

CARROLL, J.

Plaintiffs in Error.
Hannah M. Mason, Executrix,
et al.,

Error to Writ.

Defendant in Error,
Leslie P. Voorhees,

2031.A.028

Ag. No. 63.

Gen. Nos. 6241, 6242.

The seventh director was a resident of Delaware, apparently taking no part in the transactions here questioned. Early in the history of the company a plan was devised and put in execution to issue income certificates of no par value but to be sold to the purchasers of stock, one certificate to each share of stock for the total sum of no less than \$300. (\$290. for the certificate, and \$10. for the share of stock) It was also provided that the purchaser might pay for such income certificates in installments, and that the subscription should leave it optional whether the purchaser completed the payment and received his certificate, or left the installments unpaid and his subscription to be adjusted by the company by the re-sale of the certificate in a manner there provided. Afterwards in February, 1903, the directors increased the price of each share of stock, with its accompanying income certificate, to \$350. Prior to the filing of the bill 1261 income certificates had been issued, which corresponded with the number of shares of stock sold except there were three shares of stock donated to the Delaware director with no accompanying certificates.

The bill alleges that the defendant directors granted to themselves individually the right to subscribe, and did individually subscribe, for the purchase of 10 shares each of the capital stock, and 10 income certificates at one half the established price, and afterwards, under a similar grant, each individual defendant director purchased 20 shares of stock and income certificates at half price, and that they had received dividends from the corporation on stock and income certificates so issued to them.

Also that said defendant directors had wrongfully paid to themselves a commission of ten per cent, of the par value of all

The seventh director was a resident of Delaware, apparently taking no part in the transactions here questioned. Early in the history of the company a plan was devised and put in execution to issue income certificates of no par value but to be sold to the purchasers of stock, one certificate to each share of stock for the total sum of no less than \$300. (\$250. for the certificate, and \$50. for the share of stock). It was also provided that the purchaser might pay for such income certificates in installments, and that the subscription should leave it optional whether the purchaser completed the payment and received his certificate, or left the installments unpaid and his subscription to be adjusted by the company by the re-sale of the certificate in a manner there provided. Afterwards in February, 1903, the directors increased the price of each share of stock, with its accompanying income certificate, to \$350. Prior to the filing of the bill 1901 income certificates had been issued, which corresponded with the number of shares of stock sold except there were three shares of stock donated to the Delaware director with no accompanying certificates.

The bill alleges that the defendant directors granted to themselves individually the right to subscribe, and did individually subscribe, for the purchase of 10 shares each of the capital stock, and 10 income certificates at one half the established price, and afterwards, under a similar grant, each individual defendant director purchased 20 shares of stock and income certificates at half price, and that they had received dividends from the corporation on stock and income certificates so issued to them.

Also that said defendant directors had wrongfully paid to themselves a commission of ten per cent. of the par value of all

stock and income certificates sold by each director. The bill was answered, insubstance admitting the alleged transaction of the defendant directors in the purchase of stock and income certificates, and alleging in justification that they were by a vote of the stockholders authorized to so purchase the same in compensation for services that they had rendered the corporation. Also admitting the receipt of commissions of the sales of capital stock and income certificates. The trial court heard the case on the pleadings and evidence, and dismissed the bill for want of equity. The complainant appealed to this court, where it was heard, and our opinion reported in 148 Ill. App. 647 recited that the defendant directors each received 30 shares of stock and accompanying income certificates at \$150. per share, while other parties paid \$300. or more, and directed an accounting between the individual defendant directors and the company, and ordered, among other things, that in such accounting each of said directors should be charged with the full price of each share of stock and income certificate taken by him at half price, and with the dividends on said certificates received by him on said stock and income certificates, and half the dividends paid to him. The case was heard in the supreme court on writ of error (245 Ill. 256) where certain directions of this court as to other matters in the accounting were held erroneous, and the case remanded to the circuit court for further proceedings in accordance with the views expressed in the opinion of the supreme court, one of which views was that the appellate court did not err in requiring the defendant directors to account to the corporation for the full value of said stock and income certificates, and to repay the dividends which they had unlawfully withdrawn from the treasury of the corporation. The case was re-instated in the circuit court

stock and income certificates sold by each director. The bill was
 answered, in substance admitting the alleged transaction of the de-
 fendant directors in the purchase of stock and income certificates,
 and alleging in justification that they were by a vote of the
 stockholders authorized to so purchase the same in compensation for
 services that they had rendered the corporation. Also admitting
 the receipt of commissions of the sales of capital stock and income
 certificates. The trial court heard the case on the pleadings and
 evidence, and dismissed the bill for want of equity. The com-
 plaintant appealed to this court, where it was heard, and our opinion
 reported in 148 Ill. App. 647 recited that the defendant directors
 each received 30 shares of stock and accompanying income certificates
 at \$150. per share, while other parties paid \$800. or more, and
 directed an accounting between the individual defendant directors
 and the company, and ordered, among other things, that in such ac-
 counting each of said directors should be charged with the full
 price of each share of stock and income certificate taken by him at
 half price, and with the dividends on said certificates received by
 him on said stock and income certificates, and half the dividends
 paid to him. The case was heard in the supreme court on writ of
 error (248 Ill. 286) where certain directions of this court
 as to other matters in the accounting were held erroneous, and the
 case remanded to the circuit court for further proceedings in ac-
 cordance with the views expressed in the opinion of the supreme court,
 one of which views was that the appellate court did not err in re-
 quiring the defendant directors to account to the corporation for
 the full value of said stock and income certificates, and to repay
 the dividends which they had unlawfully withdrawn from the treasury
 of the corporation. The case was re-instated in the circuit court

where the defendant directors filed a cross bill setting up matters in discharge of their liability to the corporation. Complainant Voorhees filed a demurrer to the cross bill, which the court overruled and entered a decree dismissing the original bill. On appeal by Voorhees we reversed that decree and remanded the cause with directions to sustain the demurrer to the cross bill. (182 Ill.App. 569) We said the supreme court viewed the directions of this court to account for the full value of the stock and income certificates and dividends thereon as correct and proper, and therefore that question was finally determined, and that the amount to be recovered on account of stock and income certificates issued to the directors at fifty cents on the dollar was ascertained by charging them with the full value thereof; that is, the half unpaid, and of the amount of dividends they had received thereon charged on the same basis; that the record showed both by the pleadings and proof the amount of those dividends; that under the opinion of the supreme court there should be an accounting as to what their services in the matter of commissions were reasonably worth, and they should be charged with what they had received on that account, if anything, more than said services were so worth. The three opinions above referred to should be read for a more complete statement of the questions involved and decided.

The cause was re-instated in the circuit court, and March 2, 1914, a decree was there entered sustaining the demurrer and dismissing the cross bill, and for an accounting directing that the individual defendant directors be charged with one half of the "par value" of said stock and income certificates, treating that value as fixed by the former adjudications. (Truman A. Mason, one of said defendant directors, had died pending the litigation, and his executrix, Hannah E. Mason, substituted as a party to the

where the defendant directors filed a cross bill setting up matters in discharge of their liability to the corporation. Commissioner Voorhees filed a demurrer to the cross bill, which the court overruled and entered a decree dismissing the original bill. On appeal by Voorhees we reversed that decree and remanded the cause with directions to sustain the demurrer to the cross bill. (182 Ill.App. 529) We said the supreme court viewed the directions of the court to account for the full value of the stock and income certificates and dividends thereon as correct and proper, and therefore that question was finally determined, and that the amount to be recovered on account of stock and income certificates issued to the directors at fifty cents on the dollar was ascertained by charging them with the full value thereof; that is, the half unpaid, and of the amount of dividends they had received thereon charged on the same basis; that the record showed both by the pleadings and proof the amount of those dividends; that under the opinion of the supreme court there should be an accounting as to what their services in the matter of commissions were reasonably worth, and they should be charged with what they had received on that account, if anything, more than said services were so worth. The three opinions above referred to should be read for a more complete statement of the question involved and decided.

The cause was re-instated in the circuit court, and which 2, 1914, a decree was there entered sustaining the demurrer and dismissing the cross bill, and for an accounting directing that the individual defendant directors be charged with one half of the "par value" of said stock and income certificates, treating that value as fixed by the former judgments. (Truman A. Mason, one of said defendant directors, had died pending the litigation, and his executrix, Hannah E. Mason, substituted as a party to the

suit. Orders of court properly observed this substitution. No question is made on that; therefore in speaking of the defendant directors we need not notice such death and substitution)

The decree ordered the directors to account for " said unpaid half of the par value of said shares and income certificates so wrongfully appropriated by them, with interest at the rate of five per cent. and for all dividends so wrongfully paid, with interest from the times the same were paid to defendants." It further included an order for an accounting as to commissions, that was no doubt in accordance with the final directions in that regard of the former opinions. It referred the cause to the master in chancery, and directed him in stating the accounting to charge each of said directors with the sum of \$4500. par value of the unpaid half part of said 30 shares and said 30 income certificates wrongfully converted by him, together with interest on \$1500. thereof from July 16, 1902, and \$3000. thereof from December 29, 1902, at five per cent. and to credit each defendant director with all payments, if any, made by him on said half part of said shares and income certificates since the commencement of the suit, and to charge each director with all dividends at any time paid to or retained by him out of the funds of the corporation on the unpaid half part of said income certificates or shares so wrongfully appropriated, with interest from time of receipt thereof at five per cent. and ordered the master to report his conclusions of law and fact, reserving further directions until the coming in of the master's account and report, with liberty to the parties to apply for further directions.

January 13, 1915, the defendants filed a petition to modify said decretal order of reference of March 2, 1914, reciting that the

said decretal order of reference of March 2, 1914, reciting that the
 January 12, 1913, the defendants filed a petition to modify
 actions.
 and report, with liberty to the parties to apply for further dir-
 further directions until the coming in of the master's account
 of the master to report his conclusions of law and fact, reserving
 interest from time of receipt thereof of five per cent. and order-
 said income certificates or shares so wrongfully appropriated, with
 out of the funds of the corporation on the unpaid half part of
 director with all dividends at any time paid to or retained by him
 ficates since the commencement of the suit, and to charge each
 any, made by him on said half part of said shares and income certi-
 cent. and to credit each defendant director with all payments, if
 12, 1902, and \$2000. thereof from December 22, 1902, at five per
 verted by him, together with interest on \$1200. thereof from July
 of said 20 shares and said 20 income certificates wrongfully con-
 directors with the sum of \$4500. per value of the unpaid half part
 and directed him in stating the accounting to charge each of said
 former opinions. It referred the cause to the master in chancery,
 doubt in accordance with the final directions in that regard of the
 included an order for an accounting as to commissions, that was no
 from the time the same were paid to defendants." It further
 per cent. and for all dividends so wrongfully paid, with interest
 wrongfully appropriated by them, with interest at the rate of five
 half of the par value of said shares and income certificates as
 The decree ordered the directors to account for " said unpaid

master in chancery had concluded the taking of proofs, but had not reported; that the case now presented by the record and evidence upon said hearing before the master is such as to call for a change in the order for accounting; that the direction in said order of reference leaves the master no discretion except as to the amount of commissions to be allowed to the defendant directors on sales of stock and income certificates; that the supreme and appellant court decisions indicate that the defendant directors should account "not for a 'par value' of such stock and income certificates, but for the 'full value' thereof, and no suggestion is there made as to the mode by which such value be determined; that said income certificates never had any par or market value, but that the selling price thereof was authorized by stockholders to be fixed from time to time by the board of directors; that it was shares of stock only that had a par value, and this was established at \$10. by the charter, each share of stock invariably accompanying and the amount thereof credited on price of every income certificate sold; that said shares and income certificates are shown to have no market value whatever; that in such case the basis of recovery, if any, is the real value of said 30 shares and 30 income certificates at the time of alleged wrongful conversion or contracts therefor by defendants, which value appears from assets, liabilities and dividends of the company as shown by testimony before the master." Also that the master should be given greater discretion in matter of computation of interest; that the defendant directors should not be charged with interest on the amounts indicated in the order because said shares of stock and income certificates were to be paid for on the installment plan, payments in some instances extending over a period of several years before the half price in cash was paid in full and the purchaser entitled to have

master in chambers had concluded the taking of proofs, but had not reported; that the case now presented by the record and evidence upon said hearing before the master is such as to call for a change in the order for accounting; that the direction in said order of reference leaves the master no discretion except as to the amount of commissions to be allowed to the defendant directors on sales of stock and income certificates; that the supreme and appellate court decisions indicate that the defendant directors should account "not for a 'par value' of such stock and income certificates, but for the 'full value' thereof, and no suggestion is there made as to the mode by which such value be determined; that said income certificates never had any par or market value, but that the selling price thereof was authorized by stockholders to be fixed from time to time by the board of directors; that it was shares of stock only that had a par value, and this was established at \$10. by the charter, each share of stock invariably accompanying and the amount thereof credited on price of every income certificate sold; that said shares and income certificates are shown to have no market value whatever; that in such case the basis of recovery, if any, is the real value of said 30 shares and 30 income certificates at the time of alleged wrongful conversion or contracts therefor by defendants, which value appears from assets, liabilities and dividends of the company as shown by testimony before the master." Also that the master should be given greater discretion in matter of computation of interest; that the defendant directors should not be charged with interest on the amounts indicated in the order because said shares of stock and income certificates were to be paid for on the installment plan, payments in some instances extending over a period of several years before the full price in cash was paid in full and the purchaser entitled to have

the same issue to him by the company, reciting the dates and amounts of payments by the several defendant directors under their contracts to pay one-half the price of the stock and income certificates, and that except in one instance the full amount of cash installments was not paid the company until the year 1910, and in some instances the amount has not yet been paid, and that the defendant directors received no dividends "except in proportion to amount of cash or its equivalent actually paid upon their contract for said shares and income certificates." Also that said contracts were in no manner enforceable, but open to rescission at any time by the purchaser; that the only portion of said contract obligatory upon the purchaser was that he should pay \$10. per share for shares of stock accompanying any corresponding number of certificates, but in respect to the certificates the contract was not binding.

The court disposed of said petition by entering an order that the master state an account in strict conformity with the decree of March 2, 1912, and also state another account departing from the terms of said decree, among other things, by ascertaining and reporting the number of income certificates each defendant director contracted for, at half price, whether said certificates were delivered to the several subscribers, and, if so, when, how much each has paid upon such income certificates contracted for at half price, and when, and the principal amount at its face value remaining unpaid on each such certificate, and whether the contract to pay was positive or optional and amount and date of payment of each defendant, and the amount of each such dividend paid in excess of what was paid to other holders of income certificates, and to report interest at five per cent. per annum on such excess from date when received.

the same issue to him by the company, reciting the dates and amounts of payments by the several defendant directors under their contracts to pay one-half the price of the stock and income certificates, and that except in one instance the full amount of cash installments was not paid the company until the year 1910, and in some instances the amount has not yet been paid, and that the defendant directors received no dividends "except in proportion to amount of cash or its equivalent actually paid upon their contract for said shares and income certificates." Also that said contracts were in no manner enforceable, but open to rescission at any time by the purchaser; that the only portion of said contract obligatory upon the purchaser was that he should pay \$10. per share for shares of stock accompanying any corresponding number of certificates, but in respect to the certificates the contract was not binding.

The court disposed of said petition by entering an order that the master state an account in strict conformity with the decree of March 2, 1912, and also state another account departing from the terms of said decree, among other things, by ascertaining and reporting the number of income certificates each defendant director contracted for, at said price, whether said certificates were delivered to the several subscribers, and, if so, when, how much each has paid upon such income certificates contracted for at said price, and when, and the principal amount at its face value remaining unpaid on each such certificate, and whether the contract to pay was positive or optional, and amount and date of payment of each defendant, and the amount of each such dividend paid in excess of what was paid to other holders of income certificates, and to report interest at five per cent. per annum on each excess from date when received.

The master heard further testimony and reported his conclusion as to the amount to be charged to each defendant director on account of said half price stock and certificates, and commissions, under the provisions of the original decree as follows:-

Skeel,	- - - - -	\$ 7778.00;
Barrett,	- - - - -	\$3826.68;
Mason,	- - - - -	\$ 8374.63;
Allison,	- - - - -	\$ 7712.24;
Carey,	- - - - -	\$ 7777.11;
Antram,	- - - - -	\$ 7416.42.

He also reported under the decree, as modified, that no dividends were paid on shares of stock, but such dividends as were paid were upon the income certificates; that the contracts of each of said defendant directors for income certificates at half price were optional except the sum of \$10. per share, which was in full for the stock accompanying said certificates, and also applied on the purchase price of such certificates; that the contracts signed by the defendant directors were identical in form with those signed by all other subscribers for such income certificates; that in such contracts it was provided that " the payment of installments on this contract shall not be compulsory except in case of the first four payments, which pays for the shares of capital stock purchased, and also applies on the price of the income certificates; there is no further legal liability for the deferred payments or the debts of the company." That the contracts also contained clauses providing for forfeiture on failure to complete payments and for re-sale by the company to the best advantage, and to pay the proceeds, after deducting a reasonable charge for re-selling, to the delinquent purchaser. It also appeared, as we understand it, that holders of income certificates partially paid received dividends in proportion to the amount paid by them on such certificates, but that the de-

The master heard further testimony and reported his conclusion as to the amount to be charged to each defendant director on account of said half price stock and certificates, and commissions, under the provisions of the original decree as follows:-

\$ 7778.00;	Skell,
\$ 8888.88;	Barratt,
\$ 8374.63;	Mason,
\$ 7712.34;	Allison,
\$ 7777.11;	Gorey,
\$ 7416.42.	Antnam,

He also reported under the decree, as modified, that no dividends were paid on shares of stock, but such dividends as were paid were upon the income certificates; that the contracts of each of said defendant directors for income certificates at half price were optional except the sum of 10. per share, which was in full for the stock accompanying said certificates, and also applied on the purchase price of such certificates; that the contracts signed by the defendant directors were identical in form with those signed by all other subscribers for such income certificates; that in such contracts it was provided that "the payment of installments on this contract shall not be compulsory except in case of the first four payments, which pays for the shares of capital stock purchased, and also applies on the price of the income certificates; there is no further legal liability for the deferred payments or the debts of the company." That the contracts also contained clauses providing for forfeiture on failure to complete payments and for re-sale by the company to the best advantage, and to pay the proceeds, after deducting a reasonable charge for re-selling, to the delinquent purchaser. It also appeared, as we understand it, that holders of income certificates partially paid received dividends in proportion to the amount paid by them on such certificates, but that the de-

defendant directors were credited with payments in excess of the amount they had paid in cash in computing the amount of dividends due them. He states the amount of extra dividends and interest thereon received by each defendant director the same in each of his two reports.

Objections and exceptions by each party were heard by the master and the chancellor, and a decree entered overruling all exceptions and confirming the report insofar as it purports to be in strict conformity with the decree of March 2, 1914, and that the corporation recover from the several defendants the amounts respectively found in the report, with interest thereon, to the date of the decree, and in favor of the complainant for costs of suit. Afterwards the board of directors, of which the defendants, Barrett, Skeel, Carey and Antram were a controlling part, on the authority of the vote of a majority of the stockholders, caused to be entered of record a release of the money decree in favor of the corporation for the recited consideration of one dollar, and the release to the corporation of all claims of the defendant directors for services rendered. The complainant filed a petition setting up those facts and alleging that because of the revolution in Mexico the property of the corporation had become practically worthless and that it had no considerable assets except what may be recovered under the decree, and asking that a receiver be appointed to collect and administer said assets, and that the defendant directors be enjoined from prosecuting any suit to recover for services that had been passed upon by the former decrees and orders, and that the satisfaction of said decree be canceled. It appeared on the hearing that the services for which compensation was claimed by the defendant directors were those that had been performed and a subject of adjudication therefor, and the chancellor entered an order that the satisfaction of the decree of record be expunged; that the defendant directors be enjoined from

defendant directors were credited with payments in excess of the amount they had paid in cash in computing the amount of dividends due them. He states the amount of extra dividends and interest thereon received by each defendant director the same in each of his two reports.

Objections and exceptions by each party were heard by the master and the chancellor, and a decree entered overruling all exceptions and confirming the report insofar as it purports to be in strict conformity with the decree of March 2, 1914, and that the corporation recover from the several defendants the amounts respectively found in the report, with interest thereon, to the date of the decree, and in favor of the complainant for costs of suit. Afterwards the board of directors, of which the defendants, Barrett, Skeel, Carey and Antism were a controlling part, on the authority of the vote of a majority of the stockholders, caused to be entered of record a release of the money decree in favor of the corporation for the recited consideration of one dollar, and the release to the corporation of all claims of the defendant directors for services rendered. The complainant filed a petition setting up those facts and alleging that because of the revelation in Mexico the property of the corporation had become practically worthless and that it had no considerable assets except what may be recovered under the decree, and asking that a receiver be appointed to collect and administer said assets, and that the defendant directors be enjoined from prosecuting any suit to recover for services that had been passed upon by the former decrees and orders, and that the satisfaction of said decree be canceled. It appeared on the hearing that the services for which compensation was claimed by the defendant directors were those that had been performed and a subject of adjudication therefor, and the chancellor entered an order that the satisfaction of the decree of record be expunged; that the defendant directors be enjoined from

prosecuting any suit to recover for such services, and appointing a trustee to receive and collect the proceeds of said decree.

The complainant ~~xxx~~ also asked for an order allowing him solicitors fees and expenses in the prosecution of this litigation, which the court refused, holding that the same could be heard and adjusted in the future administration of the property of the corporation when it should be ascertained how much was realized from the collection of its demands under the decree.

The defendant directors prosecute this writ of error to review the whole record. The corporation appears here by counsel and confesses the errors assigned by the defendant directors, and the complainant assigns various cross errors, one of which being that the decree against the defendant directors should have been that they jointly and severally pay instead of against each one individually. The defendant directors also appealed to this court from the final order. The two cases were consolidated, and are considered as one in this opinion.

The defendant directors in their brief here state their points made upon the record as follows:-

" (1) That the errors assigned by the individual plaintiffs in error, being confessed and admitted by the corporation, the only adverse party in interest in the decree and all rights in that behalf, it is the duty of the court in such case to reverse, as in other cases of confession of error.

(2) That said final decree of June 21, 1915, and all money and proceeds to be derived therefrom, belong to and should go to the corporation, and that irrespective of the causes and questions involved leading up to and resulting in said decree,

prosecuting any suit to recover for such services, and appointing a trustee to receive and collect the proceeds of said decree.

The complainant ~~was~~ also asked for an order allowing him solicitors fees and expenses in the prosecution of this litigation, which the court refused, holding that the same could be heard and adjusted in the future administration of the property of the corporation when it should be ascertained how much was realized from the collection of its demands under the decree.

The defendant directors prosecute this writ of error to review the whole record. The corporation appears here by counsel and confesses the errors assigned by the defendant directors, and the complainant assigns various cross errors, one of which being that the decree against the defendant directors should have been that they jointly and severally instead of against each one individually. The defendant directors also appealed to this court from the final order. The two cases were consolidated, and are considered as one in this opinion.

The defendant directors in their brief here state their

points made upon the record as follows:-

" (1) That the errors assigned by the individual plaintiffs in error, being confessed and admitted by the corporation, the only adverse party in interest in the decree and all rights in that behalf, it is the duty of the court in such case to reverse as in other cases of confession of error.

(2) That said final decree of June 21, 1915, and all money and proceeds to be derived therefrom, belong to and should go to the corporation, and that irrespective of the causes and questions involved leading up to and resulting in said decree,

"the corporation, as exclusive owner and beneficiary, had the unqualified right to dispose thereof the same as any other species of property owned by it and for such consideration as the stockholders, or a majority, in good faith believed was sufficient and for the welfare and benefit of the company.

(3) That the proceedings of the corporation and its stockholders resulting in the execution of the satisfaction and release of said decree, were intra vires and purely within the domain of the policy, affairs and management of the enterprise and business, and a subject matter about which Courts have no jurisdiction or concern; where, as here, no dishonest purpose amounting to fraud is shown, no law violated, no credit injured, and no charter or statutory provision transgressed."

We regard these contentions of plaintiffs in error as entirely disposed of in the former decrees and ordered entered in the case. It is true that complainant is a small stockholder. No other stockholder has joined with him in prosecuting this suit. Practically all the other stockholders have, from the beginning, believed that the defendant directors were honestly entitled to what they had received and should not be compelled to account for the same. The trial court twice attempted to give effect to this manifest wish of the majority of the stockholders. The first time the case was considered in this court it undertook to so far comply with the desire of the stockholders other than complainant as to make the decree effective only as to complainant's pro rata share in the recovery. It was settled by the decision of the supreme court that these attempts contravened established principles of law and were unavailing. The law has compelled the prosecution of this suit for the benefit of the corporation step by step against the wishes of the directors, officers, and practically all the stockholders of the company except

"the corporation, as exclusive owner and beneficiary, had the undivided right to dispose thereof the same as any other species of property owned by it and for such consideration as the stockholders, or a majority, in good faith believed was sufficient and for the welfare and benefit of the company."

(3) That the proceedings of the corporation and its stockholders resulting in the execution of the satisfaction and release of said decree, were intra vires and wholly within the domain of the policy, affairs and management of the enterprise and business, and a subject matter about which Courts have no jurisdiction or concern; where, as here, no dishonest purpose amounting to fraud is shown, no law violated, no rights injured, and no charter or statutory provision transgressed."

We regard these contentions of plaintiffs in error as entirely disposed of in the former decrees and ordered entered in the case. It is true that complaint is a small stockholder. No other stockholder has joined with him in presenting this suit. Practically all the other stockholders have, from the beginning, believed that the defendant directors were honestly entitled to what they had received and should not be compelled to account for the same. The trial court twice attempted to give effect to this manifest wish of the majority of the stockholders. The first time the case was considered in this court it undertook to do so completely with absolute effect only as to complainant's pro rata share in the recovery. It was settled by the decision of the supreme court that these attempts contravened established principles of law and were unavailing. The law has compelled the prosecution of this suit for the benefit of the corporation step by step against the wishes of the directors, officers, and practically all the stockholders of the company except

the complainant. We see no room for the contention that after this has been done the officers of the corporation with the consent of a majority, or all of the stockholders except the complainant, may release the decree and abandon the fruits of the victory. Therefore, we conclude the court did not err in ordering the record of the release canceled, and we think it may follow without further discussion that there was no error in appointing a receiver and enjoining the defendant directors from prosecuting suits based on claims that had been the subject of consideration in the former litigation. It follows that the confession of errors on the record here by the corporation does not warrant a reversal of the decree.

The decree of March 2, 1912, under which the accounting was made, was in substantial conformity with the final directions found in the opinion of the supreme court and the last opinion of this court. It is true that the income certificates, strictly speaking, had no "par value". Their selling price was fixed from time to time by the board of directors. It is also true that their market value at the time they were wrongfully appropriated by the defendants is the basis of recovery. But it is not true that they had no market value. The record shows that many of them were sold presumably at the prices fixed by the directors and at the prices charged these defendants in the accounting. They probably had no market value in the sense that stocks and bonds listed on the exchanges have a market value, and it is true that in the light of subsequent events they may have had no intrinsic value at the time they were received by the defendant directors, but they were treated then as of a certain fixed value. The first opinion of this court so discusses them, and the last opinion of this court directs that they be so treated in the accounting. If they had a less value

the complainant. We see no room for the contention that after this has been done the officers of the corporation with the consent of a majority, or all of the stockholders except the complainant, may release the losses and abandon the fruits of the victory. Therefore, we conclude the court did not err in ordering the record of the release canceled, and we think it may follow without further discussion that there was no error in appointing a receiver and enjoining the defendant directors from prosecuting suits based on claims that had been the subject of consideration in the former litigation. It follows that the confession of errors on the record here by the corporation does not warrant a reversal of the decree.

The decree of March 2, 1912, under which the accounting was made, was in substantial conformity with the final directions found in the opinion of the supreme court and the last opinion of this court. It is true that the income certificates, strictly speaking, had no "par value". Their selling price was fixed from time to time by the board of directors. It is also true that their market value at the time they were wrongfully appropriated by the defendants is the basis of recovery. But it is not true that they had no market value. The record shows that many of them were sold presumably at the prices fixed by the directors and at the prices obtained from the defendant in the accounting. They probably had no market value in the sense that stocks and bonds listed on the exchanges have a market value, and it is true that in the light of subsequent events they may have had no intrinsic value at the time they were received by the defendant directors, but they were treated then as of a certain fixed value. The first opinion of this court does not discuss them, and the last opinion of this court directs that they be so treated in the accounting. If they had a less value

that question should have been raised in the former proceedings. The courts could not then forecast the loss and destruction of the property on the one hand, or great gains to accrue from its appreciation on the other hand. It is quite probable that at the time the stock and certificates were appropriated by the directors they reasonably expected an appreciation instead of a depreciation of value, and there was an appreciation of \$50. a share in a short time after their first purchase. Neither the fact of great appreciation or depreciation since the appropriation of the stock and certificates is material now.

It is true that the contracts under which the defendant directors received the income certificates were optional. They might, if they chose, after paying the full value of the stock at \$10. a share, make no further payments on the income certificates, in which event the company undertook to reimburse itself by a re-sale of the certificates. We need not determine what effect, if any, this form of contract would have had it been considered by this court when the first direction for an accounting was made. It apparently was not considered, and we presume it was not then called to the court's attention. The court made a definite order as to that feature of the accounting, and the supreme court adopted it. It seems to us to be beyond controversy now.

We do not understand that the defendant directors are harmed in the accounting in matter of dividends charged and interest thereon because of the fact that their contracts were payable in installments; as we have said before, that charge is the same in both methods pursued by the master in stating the account. We understand the effect of that feature of the accounting was to

that question should have been raised in the former proceedings. The court could not have forecast the loss and destruction of the property on the one hand, or great gains to accrue from its appreciation on the other hand. It is quite probable that at the time the stock and certificates were appropriated by the directors they reasonably expected an appreciation instead of a depreciation of value, and there was an appreciation of \$500, a share in a short time after their first purchase. Letting the fact of great appreciation or depreciation settle the appreciation of the stock and certificates is material now.

It is true that the certificate under which the defendant directors received the income certificates was optional. They could, if they chose, after paying the full value of the stock at \$10.00, make no further payments on the income certificates, in which event the company understood to reimburse itself by a re-sale of the certificates. We need not determine what effect, if any, this form of contract would have had if then considered by this court when the first director for an accounting was made. It apparently was not considered, and we assume it was not then related to the court's attention. The court made a definite order as to that feature of the accounting, and the account was adjusted to it. It seems to me to be beyond controversy now.

We do not understand that the defendant directors are bound in the accounting in matter of dividends declared and interest thereon because of the fact that their accounts were opened in installments; as we have said before, that appears in the record. Both methods pursued by the master in settling the account, we understand the effect of that feature of the accounting was to

charge each director with the actual amount of money that he received as dividends in excess of what he would have received considering only the actual cash paid by him on the purchase price of the shares of stock and income certificates.

The master reported, and the chancellor allowed the full amount of ten per cent. commission to the directors on their sales of stock and income certificates. Complainant objects to this, but under the evidence we do not think there was any error in this regard. We are also of the opinion that the court strictly followed the directions of the supreme court and this court in charging the amounts to the defendant directors severally instead of charging it to them jointly and severally, as complainant contends should be done.

The foregoing discussion covers what we regard as the substantial questions raised on this record. They are suggested by counsel in varying forms, but a more extended notice of the arguments would unduly extend this opinion, already too long.

We find no error in the record, therefore the decree is affirmed.

Affirmed.

Dibell, J. took no part.

charge each director with the actual amount of money that he received as dividends in excess of what he would have received had he not received the actual cash paid by him on the purchase price of the shares of stock and income certificates.

The master reported, and the chancellor allowed the full amount of ten per cent. commission to the directors on their sales of stock and income certificates. Complainant objects to this, but under the evidence we do not think there was any error in this regard. We are also of the opinion that the court strictly followed the directions of the supreme court and this court in charging the amounts to the defendant directors severally instead of charging it to them jointly and severally, as complainant contends should be done.

The foregoing discussion covers what we regard as the substantial questions raised in this record. They are suggested by counsel in varying forms, but a more extended notice of the arguments would unduly extend this opinion, already too long. We find no error in the record, therefore the decree is affirmed.

Affirmed.

Lippell, J. took no part.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

Illinois Unpublished

Opinions

203

73097

Borrower who signs this card is responsible for the return of the book.

Not Transferable.

Not to be taken from the Reading Room.

Sign legibly.

Obey these rules and avoid fines.

Date

Name

11/9/02	R. J. J.		
5/10/07	D.		
5/12/08	W. J. J.		
5/30/08	A. J. J.	529805	
7/17/09	W. J. J.	606-3700	
7/26/09	R. J. J.	3565	
8-24-05	L. J. J.		
	F. J. J.	6-305-5	
	S. J. J.		

Opinions

203

73097

Not Transferable.

Not to be taken from the Reading Room.

Sign legibly.

Obey these rules and avoid fines.

Date _____

Name _____

[illegible]

RESERVE BOOK

This reserved book is not transferable and must not be taken from the library, except when properly charged out for overnight use.

Name

3/12/73	John 236-6172
	Edna Kowalski 716 222
	Fred Bates 372 6100
	PLAT 263-3215
9-7-75	Bobby Jones 752-4830
6-21-77	W. Bishop (266-9635)
	W. Bishop (266-1000)
11-11-77	Duffing Bunt \$76 2964
5/24/78	C. Strom 263 3500
1/15/79	MANUS 716 1940
7/21/80	SEPTER 346 7100
1-29-81	S. Barunhi 443-0696
2-5-81	C. Yarr 443 0607

